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No. 694

IN THE

Supreme Court of the United States

October Term, 1956

SACRAMENTO TELECASTERS, INC., *Petitioner*

v.

McCLATCHY BROADCASTING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Sacramento Telecasters, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 18, 1956.

OPINION BELOW

The opinion of the court of appeals (App. 1a) has not yet been reported officially or in the Federal Reporter system, but is reported in 13 Pike & Fischer, Radio Regulation 2072.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1956 (App. 11a). The jurisdiction of this Court is invoked under 47 U.S.C. 402(j) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Communications Commission denied on the pleadings a petition, filed under Section 405 of the Communications Act, for reconsideration of an order modifying a construction permit for a television station. The court below reversed the commission on the ground that an evidentiary hearing was required, and that the commission was therefore precluded from acting on the petition for reconsideration as if on motion for summary judgment. The question presented is:

> Whether the Federal Communications Commission is required to order an evidentiary hearing on a petition for reconsideration under Section 405 of the Communications Act where the commission is satisfied on the basis of the facts disclosed by the pleadings that there is no valid basis to vacate or alter its prior decision.

STATUTE INVOLVED

The pertinent sections of the Communications Act of 1934, as amended, 48 Stat. 1064, as amended, 66 Stat. 715, 70 Stat. 3, 47 U.S.C. 1 *et seq.* are as follows:

> Section 309(a). If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.
>
> * * * * *

Section 309(c). When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) hereof, but with respect to issues resulting from facts set forth in the pro-

test and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

* * * * *

Sec. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, and party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. Petitions for rehearing must be filed within thirty days from the date upon which public notice is given of any decision, order, or requirement complained of. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. * * *

STATEMENT

This petition seeks review of a judgment (App. 11a) which reversed an order of the Federal Communications Commission denying a petition for rehearing under Section 405 of the Communications Act, and directed the commission to hold an evidentiary hearing. The action was initiated in the court below by an appeal by respondent pursuant to Section 402(b) of the Communications Act of 1934, 47 U.S.C. 402(b). (R. 4.)

Petitioner and respondent were competing applicants before the Federal Communications Commission for a construction permit for a new television station in Sacramento, California. The commission, after lengthy hearings, rendered a final decision in favor of petitioner. This decision was appealed to the court below (Case No. 12,470) and was ultimately sustained by that court.[1] (App. 10a.)

While the appeal from the decision in the comparative proceeding was pending before the court below, petitioner applied to the commission for modification of its construction permit to specify a different transmitter site and antenna system. This modification application was granted by the commission without hearing pursuant to Section 309(a) of the Communications Act. Thereafter, within the 30 days provided by Section 405 of the Act (*supra,* p. 4), respondent filed an unsworn petition for rehearing, seeking to have peti-

[1] No review is here sought of the judgment sustaining the commission's final decision in the comparative television proceeding (C.A.D.C. No. 12,470) which was consolidated for argument and decision with the instant case (C.A.D.C. No. 12,637). It is understood, however, on the basis of pleadings filed in the court below, that respondent intends to seek review of that decision.

tioner's modification application designated for an evidentiary hearing. Petitioner filed a sworn opposition to this petition, and respondent filed a reply to the opposition. (R. 16, 23, 62, 105.)

The commission, after considering all the pleadings, denied the petition for rehearing on the ground that respondent lacked standing to object to the modification of construction permit since it had not been injured thereby. The commission nevertheless proceeded to consider the merits of the questions raised and found, upon the basis of all the pleadings filed, that there was no sound reason for setting aside the grant of petitioner's modification application. (R. 128.)

The court below reversed the commission's decision. (App. 10a.) It held that respondent, as a former competing applicant, had standing to object to the commission's action granting the modification application.[2] And it held that the commission could not "properly proceed, as it did, to dispose of the matter as though on a demurrer which searched all the pleadings or, perhaps more accurately, as though on a motion for summary judgment under Rule 56 of the Federal Rules." (App. 9a.)

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with the Communications Act and with applicable decisions of this Court.

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[2] Petitioner believes that holding to be erroneous, but since it involves a somewhat unique factual situation, it is not believed to involve a matter of sufficient general importance to warrant review by this Court.

A petition for rehearing under Section 405 is addressed to the sound discretion of the commission.[3] It is not required to grant such a petition; the statute is worded in permissive terms: "* * * it shall be *lawful* for the Commission, *in its discretion,* to grant such a rehearing if sufficient reason therefor is made to appear" (emphasis added). The court below did not hold that, on the particular facts presented, the commission had abused its discretion. Instead, it relied upon cases[4] interpreting and applying a provision (now obsolete) of a different section of the Communications Act—Section 309(c)—as holding that an evidentiary hearing is mandatory. The court apparently failed to perceive the basic difference between the provisions for *mandatory* hearing formerly contained in Section 309(c) and the *discretionary* hearing provision found in Section 405.

Section 309(c) provides for protests against grants of applications by the commission without hearing. The protest must be under oath, and it must state with specificity the grounds upon which it is urged that the grant should be set aside. Section 309(c) was introduced into the Communications Act by the Communications Act Amendments, 1952, 66 Stat. 715. As originally enacted, the protest provision prescribed a mandatory hearing on any protest found by the commission to be technically sufficient. The section provided:

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[3] Indeed, respondent expressly conceded this principle in its brief in the court below (Appellant's Br. 27-28).

[4] *Federal Broadcasting System* v. *Federal Communications Commission,* 96 U. S. App. D. C. 260, 225 F. 2d 560; *Federal Broadcasting System* v. *Federal Communications Commission,* 97 U. S. App. D. C. 293, 231 F. 2d 246.

> The Commission shall, within fifteen days from the date of the filing of such protest, enter findings as to whether such protest meets the foregoing requirements and if it so finds the application involved *shall be set for hearing* upon the issues set forth in said protest, together with such further specific issues, if any, as may be prescribed by the Commission. [Emphasis added.]

The decisions of the court of appeals interpreting this section properly held that the commission was not vested with discretion to refuse a full evidentiary hearing on a valid protest.[5] In 1956, however, as the court below recognized (App. 10a), Section 309(c) was amended to give the commission discretion in certain circumstances to dispose of protests without evidentiary hearings. Public Law 391, 84th Cong., 2d Sess., 70 Stat. 3.

The petition filed by respondent before the commission did not purport to be under Section 309(c) and was not under oath, which is a jurisdictional requirement of the protest provision. There was no claim before the court below that the pleading could legally be treated as a Section 309(c) protest. The court below explicitly noted that this proceeding arose under Section 405, and its opinion contains two references to that section (App. 4a, 5a). It cannot be assumed, therefore, that the court thought that this case involved a Section 309(c) protest.

The holding of the court below must be interpreted as a deliberate application of the mandatory hearing standard embodied in the protest provision (until modified by Congress in 1956) to a petition for rehear-

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[5] *Supra*, note 4.

ing under Section 405, which explicitly vests the commission with discretion.

It is settled law that once an administrative agency has rendered a final decision there is no absolute right to rehearing, absent some special statutory provision therefor, and the agency's exercise of sound discretion in passing on a petition for rehearing will be upheld unless clearly erroneous. Administrative proceedings must come to an end at some point. *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515, 534-535; *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 514-515. The decision below cannot be reconciled with these decisions.

2. This case is of importance not only to the administration of the Communications Act, but to the field of administrative law generally.

Congress has wisely afforded significant procedural rights to parties before administrative agencies, and the courts are properly assiduous in safeguarding those rights. They should be equally assiduous, however, in being careful not to engraft on the administrative process mandatory procedures contrary to the statutory scheme and not required by the Constitution.

This Court has been careful to limit judicial encroachment on administrative discretion with respect to hearings and rehearings. *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515, 534-535; *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 514-515; *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.,* 337 U. S. 265; *United States* v. *Storer Broadcasting Company,* 351 U. S. 192. Unfortunately, the decision below reflects just such an encroachment.

In the instant case respondent's petition for rehearing (which was not sworn) contained allegations of fraud (App. 4a) which were based upon surmise and conjecture. These allegations were refuted in petitioner's sworn opposition to the petition. The commission, after consideration of all the pleadings, properly found that the fraud charges had not been established (R. 128-138). The court below did not overturn that finding. It ruled, as a matter of law, that the commission may not treat pleadings on a petition for rehearing as though on a motion for summary judgment (App. 9a). Thus the court has in effect read out of Section 405 the discretion explicitly vested in the commission as to the granting of rehearings.

In the instant case the court's erroneous interpretation of law, unless reversed by this Court, would result in a serious additional burden on the Federal Communications Commission, since it would require evidentiary hearings in a host of cases which lawfully could be disposed of without hearing if the commission, in its sound discretion, should so decide. And the policy, implicit in the decision below, of judicially requiring evidentiary hearings in situations where there is no statutory requirement therefor would be equally applicable in fields of administration involving other statutes and other agencies. Hence, it is important to the sound development of administrative law that the decision below be reversed.

CONCLUSION

The decision below is in conflict with Section 405 of the Communications Act and with decisions of this Court. It sets a dangerous precedent which, unless reversed, will result in the imposition of material and unnecessary new burdens on administrative processes.

Respectfully submitted,

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January 16, 1957

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,470

McCLATCHY BROADCASTING COMPANY, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
SACRAMENTO TELECASTERS, INC., INTERVENOR

On Rehearing

No. 12,637

McCLATCHY BROADCASTING COMPANY, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
SACRAMENTO TELECASTERS, INC., INTERVENOR

Appeal from Order of the
Federal Communications Commission

Decided October 18, 1956

Mr. Thomas H. Wall, with whom *Messrs. Clair L. Stout, Jerome H. Heckman* and *Thomas J. Dougherty* were on the brief, for appellant.

Mr. Richard A. Solomon, Assistant General Counsel, Federal Communications Commission, for appellee. *Messrs. Warren E. Baker,* General Counsel, Federal Communications Commission, *J. Smith Henley,* Assistant General

Counsel, Federal Communications Commission, and *Stanley S. Neustadt,* Counsel, Federal Communications Commission, were on the brief for appellee in case No. 12,470. *Messrs. Warren E. Baker,* General Counsel, Federal Communications Commission, *J. Smith Henley,* Assistant General Counsel, Federal Communications Commission, and *Henry Geller,* Counsel, Federal Communications Commission, were on the brief for appellee in case No. 12,637.

Mr. J. Roger Wollenberg, with whom *Mr. Dwight D. Doty* was on the brief, for intervenor.

Messrs. Elisha Hanson, Arthur B. Hanson, Garland Clarke and *Paul L. O'Brien* filed a brief on behalf of American Newspaper Publishers Association as *amicus curiae,* urging reversal in case No. 12,470.

Before WILBUR K. MILLER, FAHY and BASTIAN, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* During a comparative hearing on mutually exclusive applications for a television construction permit filed by McClatchy Broadcasting Company and Sacramento Telecasters, Inc., the presiding examiner permitted Telecasters, over McClatchy's objection, to amend its application. The amendment provided for a higher antenna of a different type, making Telecasters' proposed coverage practically equal to that proposed by McClatchy. As a result of the amendment the applicants stipulated there would be no substantial difference in coverage between the two proposals from an engineering standpoint, thus removing the coverage issue from the case.[1]

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[1] In the following paragraph quoted from the stipulation, we italicize a reservation which may be pertinent here:

> *"In the absence of circumstances not now known to the parties herein or disclosed by their respective applications,* it is further stipulated and agreed that all of the counsel for the

After the hearing, the examiner's initial decision found McClatchy would better serve the public interest, but the Commission disagreed. It recognized McClatchy's outstanding record of public service in the newspaper and radio fields, but considered diversification of control of facilities for the dissemination of fact and opinion to be determinative. On the basis of that holding the Commission issued October 4, 1954, a television construction permit to Telecasters, a newcomer in the communications field without radio or newspaper connections.

McClatchy appealed to this court November 1, 1954. We affirmed. *McClatchy* v. *Federal Communications Commission,* No. 12,470, decided January 27, 1956. The matter is again before us on rehearing. It was a close case, since the evidence showed and the Commission found McClatchy superior in important aspects of the comparison. But, as we said in the opinion, "Although the examiner's choice of McClatchy as superior in all respects except diversification of control is strongly supported by the proof, we cannot find that the Commission's decision was arbitrary, capricious or unsupported by substantial evidence." We adhere to that statement and accordingly on the record presented to us in case No. 12,470 again affirm the order on appeal therein.

As that record does not reflect developments in the proceeding before the Commission which took place after the grant to Telecasters was made, those subsequent events were not before us when we considered McClatchy's appeal from the order of October 4, 1954, and upheld the grant. The developments were these: Telecasters filed with the Commission November 26, 1954, an application for modification of the construction permit which had

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respective applicants and Commission counsel hereby waive cross-examination on the matters covered by this stipulation, and in addition, waive the right to present other evidence thereon."

been issued less than 60 days before. It sought to change its transmitter site from Pine Hill to Logtown, California, and to decrease the height of the antenna. These changes would reduce the coverage of Telecasters' station[2] below that which it had proposed by amendment during the hearing, which was approximately equal to that proposed by McClatchy. Without a hearing on the application for modification, the Commission granted it December 9, 1954, and publicly announced its action December 14.

January 13, 1955, McClatchy petitioned the Commission, under § 405 of the Communications Act as amended, to stay the effectiveness of the modification, and to designate for hearing Telecasters' application therefor. McClatchy's petition summarized its points as follows:

> "1. The modification of Telecasters' construction permit was granted on the basis of false representations made to the Commission;
>
> "2. The grant of the above-entitled modification, if allowed to go unchallenged, results in a fraud being practiced on the Commission and McClatchy Broadcasting Company in view of the representations made by Telecasters in the comparative hearing between it and McClatchy for the original construction permit;
>
> "3. The grant of the above-entitled modification if allowed to go unchallenged will result in a fraud being practiced upon the people in the area to be served by the station proposed by Telecasters because of the false representations made to these people with regard to the service that will be rendered; and
>
> "4. The grant of the above-entitled modification if allowed to go unchallenged will adversely affect the interests of McClatchy as this modification is directly related to the grant of the original construction permit."

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[2] The Commission says in its brief: "This modification would result in somewhat reduced coverage for Telecasters' station."

The petition, which is quite lengthy and detailed, supported the four points with specific allegations and equally detailed opposition was filed by Telecasters, to which McClatchy replied.

In the petition, McClatchy referred to circumstances which were not revealed by the respective applications and which were not known to the parties during the hearing. The allegations, therefore, fall within the reservation in the mid-hearing stipulation (see the quotation therefrom in footnote 1, *supra*, and particularly the italicized words) subject to which McClatchy had joined in waiving the right of cross-examination on the coverage issue and the right to present other evidence thereon. It seems that McClatchy's allegations were sufficient to destroy the effect of the waiver, and thus entitle it to be heard on the engineering issue which was allegedly revivified by Telecasters' application for modification.

The Commission did not afford McClatchy a hearing. In an opinion adopted March 16, 1955, and released two days later, it held McClatchy had no standing under § 405 of the Act either as licensee of a standard broadcast station at Sacramento or as the unsuccessful applicant for a television broadcast station in Sacramento. With respect to the latter, the Commission said:

> ". . . The proceeding involving McClatchy's application for a construction permit has been concluded. The time for seeking reconsideration has expired.* McClatchy is no longer an applicant for Channel 10. Standing cannot be based upon a former status. It should be noted that even if the instant

* "An appeal from the Commission's decision granting the construction permit to Telecasters and denying McClatchy's application is pending in the U. S. Court of Appeals for the District of Columbia Circuit . . . . This fact does not alter McClatchy's status. The Commission's decision has not been stayed. In the event the Commission's decision is reversed, the basic construction permit will be vacated, and both the McClatchy and Telecasters applications reconsidered. . . ."

> modification of Telecasters' permit were not to be granted, this would not serve to reinstate McClatchy as an applicant for Channel 10 because Telecasters' original construction permit would still be outstanding. . . ."

Thus the Commission attributed such finality to the grant to Telecasters made October 4, 1954, that it considered McClatchy was thereafter not a party to the proceeding in which the grant was made, and so had no legitimate interest in and could not complain of the modification of the grant or any subsequent event.

The agency decision awarding a construction permit to Telecasters was not stayed, as the Commission points out, and consequently it was effective pending appeal and Telecasters could have commenced construction thereunder by taking a calculated risk as to the result of the appeal. During the pendency of the appeal, McClatchy had no standing to protest against anything done under the unstayed order of October 4, 1954, or to object to any further order which merely implemented or explained the appealed order without changing its essential nature.

But if, while the appeal was pending here, the Commission desired, without a hearing, to modify the granted construction permit so drastically as to make it a different permit from that which we were considering, it should have notified the court it was withdrawing the grant under appeal, whereupon the appeal would have been dismissed as moot. In that event, undoubtedly McClatchy would be deemed to have standing to protest the issuance of a modified permit and demand a hearing. If on the other hand, the Commission desired merely to consider whether to approve a proposed modification which would, in effect, substitute a new permit for that on appeal, it should have moved that the case be remanded for that purpose. In that event also McClatchy would have been entitled to protest and be heard. Com-

pare *Butterfield Theatres, Inc.* v. *Federal Communications Commission*, No. 12,527, etc., decided by this court May 24, 1956.

It would obviously be unseemly for the Commission, without the knowledge or permission of the court, to substitute another grant for that which is being judicially examined on appeal, leaving the court with the time-consuming and difficult task of reaching a decision as to the validity of a construction permit which has long since ceased to exist. We held in the *Albertson* and *Enterprise* cases[3] that the Commission has jurisdiction over its orders until the period for appeal has expired. It should not render an appeal moot without the court's knowledge or consent by in effect substituting a new and different order for that which is under challenge.

We think that modifying some of the basic characteristics of a construction permit is tantamount to the issuance of a new and different permit. To do this without affording the parties to the comparative hearing a chance to protest and be heard amounts to granting a permit for construction which had not been proposed before or during the hearing and which therefore had not been compared with the proposals of other applicants.

In these circumstances, it seems clear that the Commission erred in saying McClatchy had no standing to protest. Particularly is this true in view of the charge that Telecasters had never intended to honor its mid-hearing proposal to match the coverage proposed by McClatchy, but fraudulently intended merely to gain a competitive advantage in the hearing. If the reduction in coverage had been proposed during the hearing, obviously McClatchy might have had in its superior coverage pro-

[3] Albertson v. Federal Communications Commission, 87 U. S. App. D. C. 39, 41-2, 182 F. (2d) 397, 399-401 (1950); The Enterprise Co. v. Federal Communications Commission, 97 U. S. App. D. C. 374, 378, 231 F. (2d) 708, 712 (1955).

posal an additional preference which might have turned the balance in its favor.

All that has been said depends, of course, upon the assumption that the modification was such a drastic change in the permit as to make it a new grant which, when considered in connection with McClatchy's charge of fraud, might not be in the public interest. Whether so or not was a mixed question of fact and policy which should have been considered in a hearing. Although it denied McClatchy's right to protest, the Commission regarded its charges as of such gravity as to require consideration. With respect to this, the Commission said in its opinion:

> "Despite the fact that McClatchy has no standing to request reconsideration or the other relief asked for, we believe that consideration by the Commission on its own motion of some of the allegations made in this case is nevertheless warranted because of the nature of the allegations made against Telecasters. Charges of fraud committed by a permittee in his dealings with the Commission go to his basic character qualifications, and as such warrant our close scrutiny. As the concurring Commissioners stated in the *Polan* case, *supra* [*Edward G. Polan et al.*, 8 Pike & Fischer, RR 398]:
>
> > '. . . In general, however, we think it important to point out that any substantial evidence coming before us and indicating a misrepresentation or lack of good faith by the applicant in connection with data submitted to us would require our most careful attention. In this or any other case should such evidence come to our attention—possibly for example in connection with an application for modification of a construction permit to specify a different site—we would, of course, be required to review it most carefully.'
>
> We will, therefore, consider the allegations of McClatchy relating to false representations made by Telecasters to the Commission and to the people of the Sacramento area."

We agree with the quoted statement, except we think McClatchy had standing, as we have already indicated. The question is, then, whether the Commission had authority to resolve the issues so raised by a summary decision on the pleadings or whether it should have conducted an evidentiary hearing. Could the Commission properly proceed, as it did, to dispose of the matter as though on a demurrer which searched all the pleadings or, perhaps more accurately, as though on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure?

We think not. There were admittedly serious issues of material fact. We said in *Federal Broadcasting System* v. *Federal Communications Commission*, 96 U. S. App. D. C. 260 263, 225 F. (2d) 560, 563 (1955):

> ". . . What is required [of a protest under § 309 (c)] is merely an articulated statement of some fact or situation which would tend to show, *if established at a hearing*, that the grant of the license contravened public interest, convenience and necessity, or *that the licensee was technically or financially unqualified*, contrary to the Commission's initial finding." [Emphasis supplied.]

In a second *Federal Broadcasting System* opinion,[4] we said, "Certainly in the absence of some established procedural system to the contrary, we think it improper to rely solely on an opposition pleading as a basis for a finding of fact;" and later added:

> ". . . Only if it is clear from the face of the protest, taking all the protestant's allegations as true, that there is no real merit in protestant's position or substantial possibility that a hearing will reveal merit, should the protest be rejected without a hearing."

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[4] Federal Broadcasting System v. Federal Communications Commission, 97 U. S. App. D. C. 293, 297, 231 F. (2d) 246, 250 (1956).

In closing the opinion, we said the views therein expressed were based on our interpretation of the statutes as they stood at the time of the Commission's challenged action. We did not deem it necessary or appropriate to decide whether the amendment of § 309(c), which gave the Commission power to consider a protest as though on demurrer,[5] "is to be applied retroactively, or, if it is to be so applied, in what manner (if at all) it affects the present case." Here also the Commission's challenged action was taken long before the 1956 amendment of § 309(c).

We noted in *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 96 U. S. App. D. C. 211, 215, 225 F. (2d) 511, 515 (1955), that

> "Section 309(c) [as it stood before the 1956 amendment] also provides that if, as here, the Commission finds that the protest meets the 'party in interest' and 'particularity' requirements, 'the application involved shall be set for hearing upon the issues set forth in said protest, *together with such further specific issues, if any, as may be prescribed by the Commission.*'" [Emphasis in the quoted opinion.]

Our conclusion is the Commission erred in holding McClatchy lacked standing to challenge the modification proposal, and in summarily dismissing the protest which it nevertheless considered. The Commission should conduct an evidentiary hearing on the protest and then decide whether to set aside either the modified grant to Telecasters, or the modification and the original grant as well; and in either event to consider what action thereafter would be appropriate.

Order in case No. 12,470 affirmed.

Order in case No. 12,637 reversed and case remanded for proceedings in accordance herewith.

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[5] Public Law No. 391, 84th Cong., 2d Sess., approved January 20, 1956, 47 U. S. C. § 309(c).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1956

No. 12,637

McCLATCHY BROADCASTING COMPANY, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
SACRAMENTO TELECASTERS, INC., INTERVENOR

Appeal from Order of the
Federal Communications Commission

Before: WILBUR K. MILLER, FAHY and BASTIAN, *Circuit Judges.*

Judgment

This appeal came on to be reheard on the record from the Federal Communications Commission, and was reargued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the said Federal Communications Commission appealed from in this case be, and it is hereby, reversed, and that this case be, and it is hereby, remanded to the said Federal Communications Commission for further proceedings in accordance with the opinion of this Court.

Dated: October 18, 1956.

Per Curiam.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 694

SACRAMENTO TELECASTERS, INC., PETITIONER

v.

MCCLATCHY BROADCASTING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

This case involves a decision of the Federal Communications Commission denying, without hearing, a petition filed by McClatchy Broadcasting Company ("McClatchy") seeking reconsideration of a Commission order which granted Sacramento's application for modification of its construction permit for a new television station to specify a new transmitter site and antenna system. On appeal, the court below reversed the Commission, on the ground, *inter alia*, that McClatchy should have been afforded an evidentiary hearing on its pleading.

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Petitioner contends (Pet. 8–9) that the decision below enunciates a general rule that petitions for rehearing filed under Section 405 of the Communications Act of 1934 require the same mandatory hearings as protests filed under Section 309(c) of the Act. While such a holding would present an important question under the Communications Act, we do not believe that the decision below declares any such general rule. Although the court initially refers to McClatchy's petition as one for rehearing filed under Section 405 (Pet. App. 4a, 5a), the latter parts of the opinion make several references to it as a protest filed under Section 309(c) (Pet. App. 6a–10a). In the concluding paragraph, the court speaks of McClatchy's "protest," and states that "[t]he Commission should conduct an evidentiary hearing on the *protest*" (Pet. App. 10a, emphasis supplied). While the court cites cases under Section 309(c), it does not purport to announce any general rule, and seemingly rests its holding on the particular facts of the instant case.

In these circumstances, we believe that the court below either acted upon the assumption that McClatchy's pleading was a protest under Section 309 (c) or held that the Commission had abused its discretion by failing to hold an evidentiary hearing to consider McClatchy's allegations. Under either view, the correctness of the decision below raises no question of sufficient importance to warrant review by this

Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 694

SACRAMENTO TELECASTERS, INC., *Petitioner*,

v.

McCLATCHY BROADCASTING COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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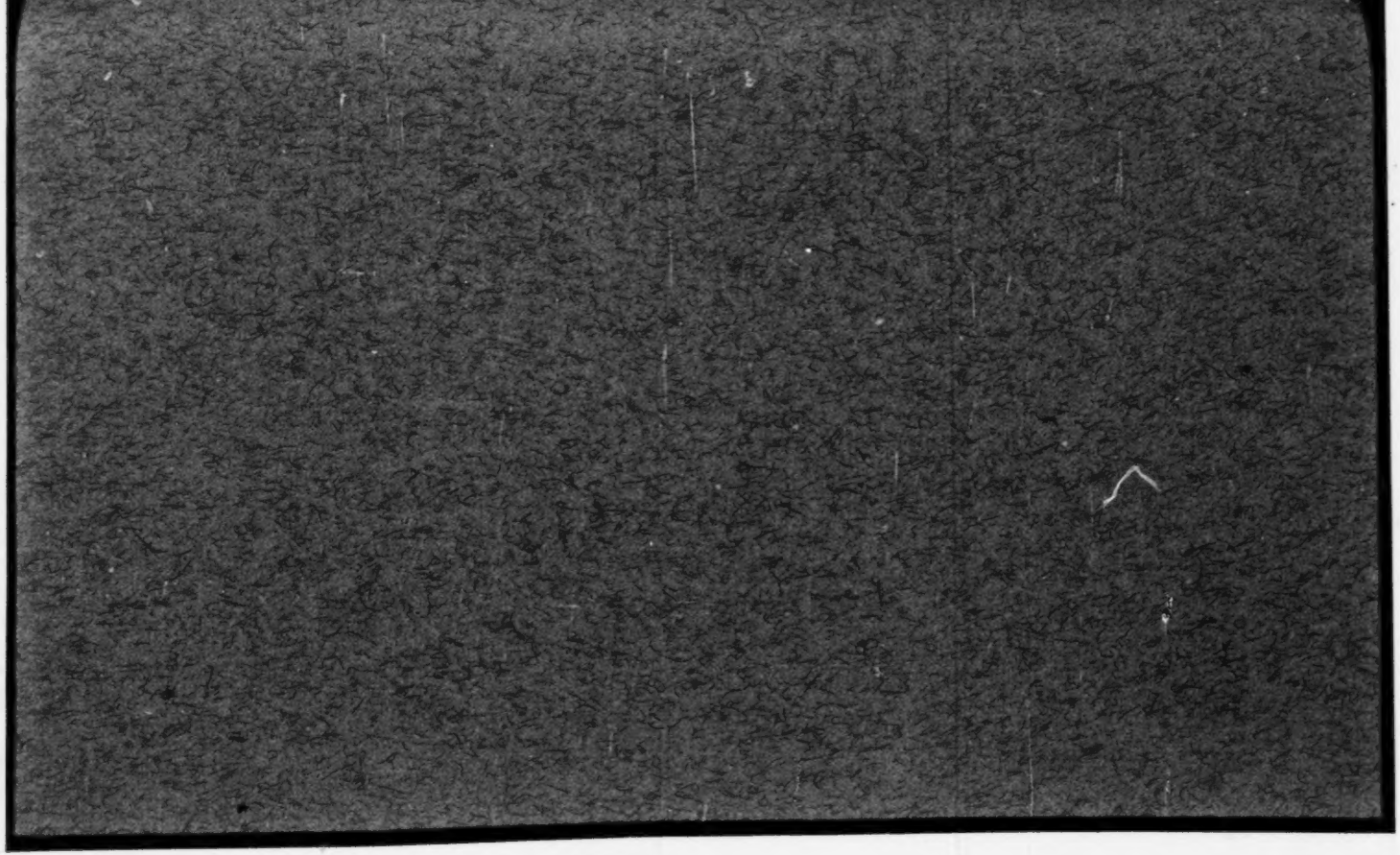

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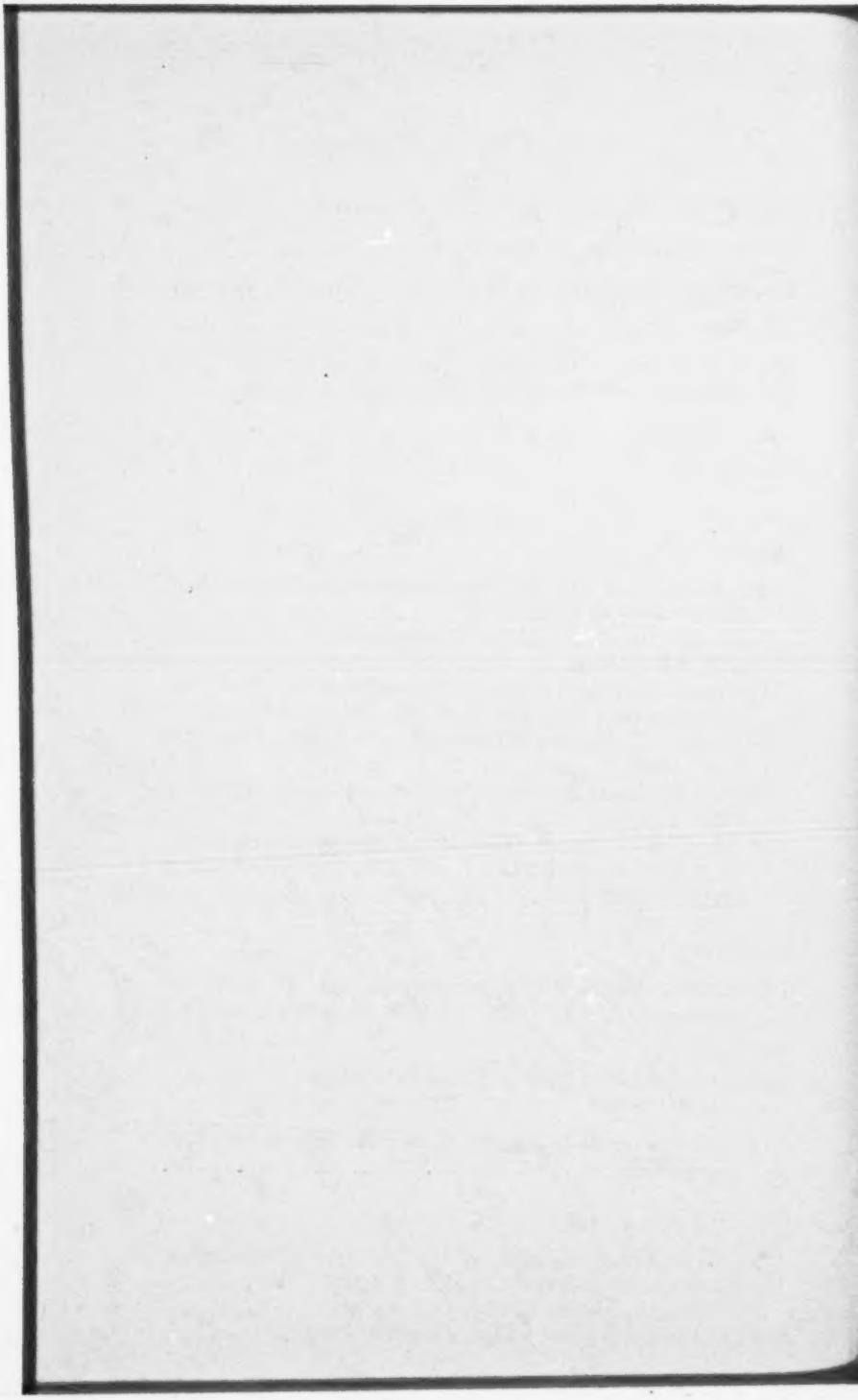

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the court below properly concluded, in the circumstances of the case, that the Federal Communications Commission erred in denying respondent's petition for a hearing on petitioner's application for modification of a television construction permit.

COUNTER STATEMENT OF THE CASE

In order that the decision of the court below may be interpreted properly, it is necessary to set forth, in detail, considerable background material which petitioner has omitted to mention.

On July 23, 1952, the Federal Communications Commission designated for consolidated hearing the mutually exclusive applications of McClatchy Broadcasting Company and Sacramento Telecasters, Inc., for a new television station to operate on Channel 10 in Sacramento, California.[1] Both applications specified transmitter and antenna sites on land owned by the State of California at Pine Hill, California. (R. 25.)[2]

After the comparative hearing had commenced, Telecasters sought leave to amend its application to increase the height of its antenna structure and to change the type of the antenna, making Telecasters' proposed coverage substantially equal to the coverage proposed by McClatchy. (R. 26.) McClatchy opposed the amendment on the ground that its true purpose was to improve Telecasters' chance of success in the hearing by the removal of a comparative disadvantage, and that Telecasters had not demonstrated "good cause"[3] for the allowance of the amendment. Nevertheless, the Examiner granted the petition for leave to amend.[4] (*Ibid.*) As a result thereof, McClatchy stipulated with

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[1] McClatchy Broadcasting Company, respondent, will sometimes hereinafter be referred to as "McClatchy"; Sacramento Telecasters, Inc., petitioner, will sometimes hereinafter be referred to as "Telecasters"; and the Federal Communications Commission will hereinafter be referred to as "Commission".

[2] Record citations to the record in this case will be indicated as follows: "(R.)". References will also be made herein to the record in a companion case, No. 733, 1956 Term, presently pending before this Court. Citations to the record in No. 733 will be indicated as follows: "(733-R.)".

[3] Section 1.365 of the Commission's Rules and Regulations, 47 C.F.R. § 1.365 (1953).

[4] See McClatchy Broadcasting Co., 8 Pike & Fischer R.R. 655, 657-58 (1952).

Telecasters that there would be no substantial difference in coverage between the two proposals from an engineering standpoint. (R. 61-62.)

Prior to the amendment of Telecasters' application, McClatchy clearly could have relied on the greater height of its proposed antenna, and the resultant greater coverage, as a comparative factor in its favor. The allowance of the amendment, and the stipulation which followed, removed the issue of coverage from the case.[5]

Thereafter, following a 48-day hearing, the Examiner released an Initial Decision granting the application of McClatchy and denying the mutually exclusive application of Telecasters. However, on October 4, 1954, the Commission reversed the Initial Decision, and granted Telecasters' application. The Examiner had found McClatchy to be the superior applicant, concluding that the program service rendered by McClatchy's existing broadcast facilities had been consonant with licensee responsibilities; that in the nonprogramming field McClatchy's record of performance was "truly impressive"; and, in the field of public service, McClatchy's record, "viewed in its entirety, is symbolic of the type of activity that has made radio the great medium it is today." (733-R. 46, 52.)

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[5] As the court below noted in note 1 of its opinion, the stipulation contained a pertinent reservation, as follows:

> "'*In the absence of circumstances not now known to the parties herein or disclosed by their respective applications,* it is further stipulated and agreed that all of the counsel for the respective applicants and Commission counsel hereby waive cross-examination on the matters covered by this stipulation, and in addition, waive the right to present other evidence thereon.'" (Emphasis supplied by court below.)

The Commission's decision recognized the superiority of McClatchy over Telecasters, but nevertheless awarded the television grant to Telecasters on the sole ground that McClatchy had newspaper and radio interests. (733-R. 55 *et seq.*) McClatchy thereupon appealed the comparative case to the Court of Appeals.

On November 26, 1954, just 53 days after the Commission had granted Telecasters a construction permit pursuant to the comparative hearing, and while that case was pending on appeal in the Court of Appeals, Telecasters filed an application with the Commission for modification of its newly obtained construction permit to specify, among other changes, a new and different location for its transmitter and antenna. (R. 129.) The modification application sought to change the site from Pine Hill to Logtown, California, which resulted in a reduction in coverage. (*Ibid.*) Although public announcement of the filing of that application was not given until December 6, 1954 (FCC Public Notice 13656) the Commission granted the modification application without hearing on December 9, 1954.[6] (R. 129.)

On January 13, 1955, McClatchy petitioned the Commission, pursuant to Section 405 of the Communications Act of 1934, as amended, 66 Stat. 720, 47 U.S.C. § 405, to: (1) stay the grant of Telecasters' modification application; (2) set that application for hearing to determine whether a grant thereof is in the public interest; and (3) make McClatchy and the Commission's Broadcast Bureau parties respondent to the hearing so ordered. (R. 23.) McClatchy argued,

[6] Public announcement of the grant of the modification application was not made until December 14, 1954. FCC Public Notice 14356.

inter alia, that it had standing to take issue with the grant of the modification because, as the losing applicant in the comparative case, it was adversely affected and seriously aggrieved since the grant of the modification wiped out part of the basis for the comparative decision. (R. 24, 27, 39-42.) With respect to the matter of coverage, McClatchy showed, among other things, that Telecasters' modification proposal "provides less coverage than any proposal heretofore advanced by Telecasters" (R. 32.); and that Telecasters' construction permit, as modified, "contemplates an alarmingly inferior proposal when compared to the coverage which would have been afforded the Sacramento area had the application of McClatchy Broadcasting Company been granted" (R. 33.).[7] A comprehensive engineering report was submitted to demonstrate the reduced coverage and intensity of signal as a result of Telecasters' change of antenna site. (R. 43-59.)

On January 24, 1955, Telecasters filed an opposition to the McClatchy petition. (R. 62-84.) Significantly, however, that opposition did not deny that the coverage under the modified construction permit would be significantly less than the coverage proposed by it or by McClatchy in the comparative hearing. Accepting the fact of reduced coverage, Telecasters merely argued that, "all things considered," the new Logtown site is better than the Pine Hills site. (R. 81-82.)

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[7] McClatchy's petition also made allegations regarding the change in studio location covered by the modification, and false representations made by Telecasters both to the Commission and to the people of the Sacramento area in connection with the changes embraced in the modification application. In view of the narrowness of the question presented to the Court by petitioner, it is unnecessary to burden this opposition with those phases of this case.

On March 18, 1955, by its memorandum opinion and order the Commission denied McClatchy's petition. (R. 128-138.) The Commission held that McClatchy was not a party aggrieved by the order granting Telecasters' modification application, and that therefore McClatchy did not have standing under § 405 of the Act to request reconsideration of the Commission's action. After so holding, the Commission, "on its own motion", proceeded to examine "*some* of the allegations made in this case"—"the allegations of McClatchy relating to false representations made by Telecasters to the Commission and to the people of the Sacramento area." (Emphasis supplied.) (R. 132, 133.) On the basis of the pleadings before it, the Commission rejected McClatchy's allegations of misrepresentation on the part of Telecasters. However, again significantly, the Commission did not deny, but rather recognized, that coverage from the Logtown site would be substantially less than from the Pine Hill site. (R. 135, 136.) Its only conclusions touching the matter of reduced coverage were to the effect that the pleadings would not sustain a finding of fraud or misrepresentation by Telecasters with respect to coverage.

Thereupon, on April 12, 1955, respondent appealed to the Court of Appeals from the order of the Commission denying its petition to set Telecasters' modification application for hearing. (R. 4-14.) As of that date, respondent's appeal in the comparative case was still pending in the same court. On January 27, 1956, the Court of Appeals handed down its decision affirming the Commission in the comparative case (Court of Appeals Case No. 12,470). See Appendix to Petition for Certiorari in No. 733, 1956 term, p. 1. The court, however, found "much in support of the examiner's position concerning diversification of control", and

stated that "the examiner's choice of McClatchy as superior in all respects except diversification of control is strongly supported by the proof. . . . " (*Id.*, at 6 and 7-8.) Respondent moved the court for rehearing in that case, pointing out the pendency of the appeal in the modification case (Court of Appeals Case No. 12,637) and the interrelationship between the two cases. The court granted rehearing on May 10, 1956, and at the same time consolidated the two appeals for further argument.

On October 18, 1956, the Court of Appeals rendered both its decision on rehearing in the comparative case (No. 12,470) and its decision in the modification case (No. 12,637). Although finding the Appeal in No. 12,470, a *"close case, since the Commission found McClatchy superior in important aspects of comparison"* (Emphasis supplied), the court again affirmed the Commission.[8] In No. 12,637, the modification case, the court held that McClatchy, as the losing applicant in the comparative case, did have standing to seek a hearing on Telecasters' modification application (Petition App. 7a, 9a, 10a), and further that the Commission erred in refusing McClatchy a hearing on its petition therefor. The court ordered the Commission to *"conduct an evidentiary hearing on the protest and then decide whether to set aside the modified grant to Telecasters, or the modification and the original grant as well; and in either event to consider what action thereafter would be appropriate."* (Emphasis supplied) (Petition App. 10a.)

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[8] As previously suggested, respondent has filed a petition for certiorari to review the judgment of the Court of Appeals in No. 12,470. That petition is pending before this Court as No. 733, 1957 Term, and raises the question whether the Commission had the power to award the original grant to Telecasters on the sole ground that McClatchy has newspaper and broadcasting interests in the area involved.

REASONS FOR DENYING THE WRIT

1. Introduction

The basic premise upon which petitioner proceeds before this Court is that "the court below did not hold that, on the particular facts presented, the Commission had abused its discretion." (Petition 7.) Therefore, the petitioner reasons, the court erred in reversing the Commission since petitions for rehearing under § 405 of the Act are addressed to the sound discretion of the Commission. And further, petitioner notes and relies upon cases decided by this Court[9] which hold that, as a general rule, administrative agency decisions on petitions for rehearing are discretionary rulings which "will be upheld unless clearly erroneous." (Petition 9.)

The difficulty with petitioner's argument is that it assumes an erroneous premise. It is true that the court below did not use the term "abuse of discretion" in its opinion. However, an examination of the opinion in the light of the facts presented will demonstrate that the court did apply the proper standards for review of the Commission's action.

As a preliminary matter, it is important to observe that respondent's petition to the Commission did not seek rehearing in the sense that it was asking the Commission to provide another or further hearing. Rather, respondent sought to be heard for the first time with respect to the propriety of petitioner's modification application. Since the Commission had already granted Telecasters' modification, respondent's

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[9] *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 534-535; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-515.

petition was one which, procedurally speaking, sought reconsideration of a Commission order. In that sense the petition was one for "rehearing" under § 405 of the Act. However, substantively, the petition was one for intervention and hearing, not rehearing. It asked that McClatchy be made a party to the modification proceeding and that a hearing be held on the modification application. See *WJR, The Goodwill Station* v. *Federal Communications Commission,* 174 F. 2d 226, 243 (dissenting opinion, 1948); *Federal Communications Commission* v. *WJR,* 337 U.S. 265, 280 (1948); *Albertson* v. *Federal Communications Commission,* 182 F. 2d 397 (1950). In effect, respondent was in the same position with respect to its attack on the Commission's order granting Telecasters' modification application as it would have been had it made the attack on the application prior to the grant.[10] Intervention and initial hearing were sought by respondent; not a second or supplemental hearing in a proceeding in which respondent had already once been heard.

It is apparent from the above clarification that, even without regard to other considerations, the decision below is not in conflict with either *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, or *Inter-*

[10] In this connection it should be noted that there is no statutory or other provision which required McClatchy to complain of the modification before the grant thereof. In fact, the Act contemplates that attacks such as the one involved here will be made after grant of the application. See §§ 405 and 309(c) of the Act, petition pp. 3-4. Moreover, even assuming an attack such as this is permissible prior to grant, as a practical matter McClatchy had no opportunity to make its complaint before the modification application was granted. The Commission granted the application just three days after public notice of its filing was issued. And public notice of the grant was not given until five days after the effective date of the grant. See Counter-Statement, *supra,* p. 4.

state Commerce Commission v. *Jersey City*, 322 U.S. 503. In both of those cases the Court held that, in the circumstances, the Interstate Commerce Commission had not abused its discretion in denying petitions for rehearing. However, unlike the present case, the parties who filed for rehearing in the *Pierce* and *Jersey City* cases had participated in the agency proceedings which resulted in the order sought to be reconsidered on rehearing. In the instant case, when McClatchy filed its § 405 petition, it had not yet had an opportunity to participate in any way in the proceedings which led to the modification order.

This is not to say that respondent's § 405-petition did not call for an exercise of the Commission's discretion. Section 405 itself is in terms of agency discretion. However, the fact that McClatchy's petition was, in substance, one for intervention and hearing, as distinguished from one for further hearing and reconsideration by a party who had already participated, points up that the court below, without violating the principle or rationale of *Pierce* or *Jersey City*, could find an abuse of Commission discretion here.

2. The Court of Appeals Held, in Effect, That the Commission Abused Its Discretion

A large part of the opinion below is devoted to a discussion of the facts and circumstances which led the court to conclude that McClatchy had standing under § 405. In the court below, both petitioner and the Commission took the position that respondent had no standing either as a licensee of a standard broadcast station in Sacramento or as the losing applicant in the comparative television proceeding. For purposes of its present petition for certiorari, petitioner

now accepts the ruling of the Court of Appeals that respondent had standing to challenge the modification grant as the losing applicant in the comparative case. (See Petition, p. 6, note 2.) Petitioner then attempts to create the illusion that nothing said in the opinion below up to and including the holding on the issue of standing, is material to the question presented to this Court. In effect, petitioner wants the Court to view the last two pages of the opinion below *in vacuo,* without taking into account the basis or ramifications of the court's holding on the issue of standing. Such a reading of the opinion is unrealistic and inaccurate.

As previously noted, the Commission granted Telecasters' modification application at a time when the appeal in the comparative proceeding was pending. The court viewed this situation with considerable alarm. In this connection, the court stated:

> "But if, while the appeal [in the comparative case] was pending here, the Commission desired, without a hearing, to modify the granted construction permit so drastically as to make it a different permit from that which we were considering, it should have notified the court it was withdrawing the grant under appeal, whereupon the appeal would have been dismissed as moot. In that event, undoubtedly McClatchy would be deemed to have standing to protest the issuance of a modified permit *and demand a hearing.* If on the other hand, the Commission desired merely to consider whether to approve a proposed modification which would, in effect, substitute a new permit for that on appeal, it should have moved that the case be remanded for that purpose. In that event also McClatchy would have been entitled to protest *and be heard.* * * *
>
> "It would obviously be unseemly for the Commission, without the knowledge or permission of

> the court, to substitute another grant for that which is being judicially examined on appeal, leaving the court with the time consuming and difficult task of reaching a decision as to the validity of a construction permit which has long since ceased to exist. * * * It [the Commission] should not render an appeal moot without the court's knowledge or consent by in effect substituting a new and different order for that which is under challenge." (Emphasis supplied.) (Petition App. 6a-7a).

Thus, the court was of the view that McClatchy was entitled to a further *comparative* hearing if the modified permit issued to petitioner was a "new and different permit"[11] from that which was originally issued pursuant to the comparative case.[12] Under this rationale, McClatchy would have a right to the further comparative hearing upon proof that the modified permit represented a "new and different permit." The court clearly viewed McClatchy's § 405-petition as raising the question whether that condition was met. In other words, the court was of the view that respondent had alleged facts in its § 405-petition which, if true, would prove that the modification was "such a drastic change in the permit as to make it a new grant." (Petition App. 8a.) Those allegations, coupled with the *right* to further *comparative* hearing upon proof

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[11] A "new and different permit" was defined by the court as one embodying a change in "some of the basic characteristics of a construction permit." (Petition App. 7a).

[12] Note also the last paragraph of the opinion below where the court instructs the Commission to "conduct and evidentiary hearing on the protest and then decide whether to set aside either the modified grant to Telecasters, or the modification *and the original grant as well* . . ." (Emphasis supplied.)

thereof, gave respondent standing to raise the allegations and attendant issues under § 405.

What allegations in the § 405-petition did the court view as raising the issue whether the modification resulted in a "new and different permit"? Early in its opinion, the court detailed the circumstances which led to the removal of the coverage issue from the comparative case. It alluded to the fact that, over McClatchy's objection, Telecasters had amended its proposal during the comparative hearing to increase its antenna height; it noted the stipulation which followed the allowance of the amendment; it referred to the fact that the modification approved a change by Telecasters to a different transmitter and antenna site than the site proposed by both applicants in the comparative case, as well as a reduction in antenna height; it noted that the Commission recognized the modification as involving "somewhat reduced coverage for Telecasters' station" (Petition App. 4a, note 2); and, of course, it had before it McClatchy's substantially uncontradicted factual allegations showing a significant reduction in coverage, and was, in addition, aware of the fact that the comparative case was, at best, a "close case." With these matters in mind, the court stated:

> "In these circumstances, it seems clear that the Commission erred in saying McClatchy had no standing to protest. Particularly is this true in view of the charge that Telecasters had never intended to honor its mid-hearing proposal to match the coverage proposed by McClatchy, but fraudulently intended merely to gain a competitive advantage in the hearing. *If the reduction in coverage had been proposed during the hearing, obviously McClatchy might have had in its su-*

perior coverage proposal an additional preference which might have turned the balance in its favor.

"All that has been said depends, of course, upon the assumption that the modification was such a drastic change in the permit as to make it a new grant which, when considered in connection with McClatchy's charge of fraud, might not be in the public interest. *Whether so or not was a mixed question of fact and policy which should have been considered in a hearing.* * * *" (Emphasis supplied.) (Petition App. 7a-8a).

The court could have concluded its opinion at that point. If it had done so there would have been no doubt that the holding, in effect, was that the Commission, under the circumstances, had abused its discretion in denying respondent a hearing on its § 405-petition. In view of the claim by respondent that the modification substantially reduced the coverage, and in view of the admissions by Telecasters that there was a reduction in coverage, the pleadings, at the very least, presented a substantial question as to whether respondent had a right to further comparative consideration with Telecasters. Accepting the existence of such a right if the original grant was superseded by the modification (which petitioner must do in the light of its decision not to attack the holding below with respect to the standing issue), and accepting as factual respondent's allegations of reduced coverage (which petitioner must likewise do since those allegations were not controverted before the Commission or denied by either the Commission or petitioner in the Court of Appeals), the conclusion necessarily follows that the Commission abused its discretion in refusing to grant respondent a hearing. See *WJR, The Goodwill Station* v. *Federal Communi-*

cations Commission, 174 F. 2d 226, 245 (dissenting opinion, 1948); *cf., Federal Communications Commission* v. *WJR,* 337 U.S. 265 (1949), and *Federal Communications Commission* v. *National Broadcasting Co.,* 319 U.S. 239 (1943).

3. Petitioner's Case

After holding that the Commission erred in not giving respondent a hearing, the court below proceeded with a discussion of the Commission's gratuitous treatment of *some* (but not all) of the allegations made by respondent.[13] With respect to those allegations, the court stated that the Commission could not resolve the issues raised thereby by a "summary decision on the pleadings." (Petition App. 9a.) And the court supported that conclusion by borrowing specific quotations from cases construing § 309(c) of the Act. Petitioner bases its entire petition for certiorari on this portion of the court's opinion. However the significance of that portion of the opinion is patently *de minimis* in the context of the entire controversy. Before the court reached the discussion which the petitioner attacks, it had already held that the Commission committed reversible error in denying respondent a hearing. Thus, to some degree the statements of the court regarding the Commission's summary treatment of certain issues are *obiter dicta.* Moreover, any reasons which may exist in favor of summary disposition

[13] It will be recalled that the Commission initially held that respondent had no standing to attack the modified grant. Nevertheless, on its own motion, it considered respondent's allegations of misrepresentation on the part of petitioner, and rejected them on the basis of the pleadings. The Commission, however, did not consider the merits of respondent's charge that the modification resulted in a substantial reduction in coverage. It conceded that coverage was reduced by the modification.

of petitions for rehearing under the doctrine of *United States* v. *Pierce Auto Freight Lines, supra,* and *Interstate Commerce Commission* v. *Jersey City, supra,* and which are otherwise applicable to requests for initial hearing and intervention, evaporate as to respondent's allegations of misrepresentation when, as the court initially held, a hearing on the § 405-petition is nevertheless required as a result of the allegations of reduced coverage. Stated otherwise, since here the issue of reduced coverage gave a right to an evidentiary hearing on its § 405-petition, it neither violates § 405 of the Act nor the doctrine of the *Pierce* and *Jersey City* cases to require the Commission to await decision on any other issues until after the required hearing is held and the record therefrom is developed.[14]

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[14] Petitioner also argues that the holding below "must be interpreted as a deliberate application of the mandatory hearing standard embodied in the protest provision [viz., § 309(c) prior to the 1956 amendment thereto] . . . to a petition for rehearing under Section 405." (Petition 8-9) This argument is based on the fact that the court quoted from § 309(c) cases when discussing the propriety of the Commission's summary treatment of the misrepresentation issues. If this portion of the court's opinion is not *dictum,* the most which can be said with respect to the court's reliance on the § 309(c) cases is that, where a hearing is otherwise *required* pursuant to a § 405 petition in the nature of a petition to intervene, the court is of the opinion that the considerations behind the *mandatory* hearing requirements of the unamended § 309(c) apply to preclude summary disposition by the Commission of any subsidiary issue. Such a holding is extremely logical since § 309(c) is a statutory provision specifically available to test grants without hearing. Thus, any protest under § 309(c), like the § 405-petition in this case, is in the nature of a petition to intervene.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the Court of Appeals should be denied.

However, in the event the Court should grant the petition, it is urged and respectfully submitted that the petition for a writ of certiorari in No. 733, 1956 Term, likewise should be granted. The argument above should make clear that the merits of the comparative case, the subject matter of the petition in No. 733, bore upon and influenced the Court of Appeals' decision in the case sought to be reviewed here. The present case was not decided by the court below as an isolated controversy wholly disconnected from the comparative case. Both proceedings before the Commission—the comparative case and the modification case—were before the Court of Appeals at the same time. The former was characterized by the court as being a "close case". Respondent has argued as petitioner in No. 733 that that proceeding was unlawfully decided by the Commission in favor of Telecasters on the basis of an illegal policy of discrimination, and was, therefore, erroneously affirmed by the court. Immediately upon the heels of that proceeding, and while it was pending on appeal in the Court of Appeals, the Commission not only permitted Telecasters to modify its recently acquired construction permit in such a way as to further detract from the comparative desirability of its proposed operation over the operation proposed by McClatchy, but the Commission allowed the modification without giving McClatchy any hearing on the propriety thereof. The discrimination in the comparative proceeding was compounded by the arbitrariness

in the modification proceeding. Under the circumstances, it would be unrealistic and impossible to review the second phase of this litigation without contemporaneously having the first phase thereof before the Court.

Respectfully submitted,

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REPLY TO OPPOSITIONS

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REPLY TO OPPOSITIONS

In the petition for certiorari it was pointed out that the court below has in effect read out of the Communications Act the important discretionary power explicity vested by Congress in the Federal Communications Commission in Section 405 of the Act. The Government concedes that if the court below has enunciated a general rule that petitions for rehearing filed under Section 405 of the Act, 47 U.S.C. 405, require the same mandatory hearings as protests filed under

Section 309(c), 47 U.S.C. 309(c), an important question would be presented (Gov't. Opp. 2.) But the Government denies that the decision below is properly so to be interpreted. It asserts that "we believe that the court below either acted upon the assumption that McClatchy's pleading was a protest under Section 309(c) or held that the Commission had abused its discretion * * *" (*ibid.*).

Examination of the opinion below demonstrates that the Government's interpretation is quite barren of foundation. By explicitly stating in its opinion that the case arose under Section 405 (Pet. App. 4a), the court of appeals gave irrefutable evidence of its knowledge of that fact. In light of this reference to Section 405 (and a subsequent reference (Pet. App. 5a)), this Court surely will not presume that the court below (which heard oral argument in this case twice) was unaware of the basic nature of the case.[1]

The Government's alternative theory is, if anything, even less tenable. Although not a word is found in the opinion below to suggest that the lower court thought it was dealing with a discretionary matter, the Government suggests (without record citation) that the court may have intended to hold that there was an abuse of discretion. To reach its conclusion, the Government is forced to disregard the only language in the court's opinion which deals with the question whether McClatchy, assuming it had standing,[2] was entitled to an evidentiary hearing (Pet. App.

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[1] Emphasis was also placed upon the distinction between a Section 405 case and a Section 309(c) case in petitioner's brief in the court below (Intervenor's Br. 17-19).

[2] McClatchy's standing is not in issue in the petition for certiorari.

9a-10a). That language is not addressed to the facts of this case, but to decisions interpreting Section 309(c)—decisions which give full scope to a mandatory statutory right to a hearing where a valid protest is filed to a Commission decision made without hearing.

Respondent also seeks to refashion the decision below by interpretation, but respondent takes a different approach. Respondent suggests that the only language in the opinion below dealing with McClatchy's right, assuming standing, to an evidentiary hearing is "to some degree" *obiter dicta* (Resp. Opp. 15). If the language upon which petitioner relies (Pet. App. 9a-10a) were *obiter dicta,* the decision below would be without a holding on McClatchy's asserted right to a hearing. For the remainder of the court's opinion is devoted to the standing issue.

In sum, if the court below was aware that this was a Section 405 case (and its opinion unmistakably indicates that it was aware of that fact), the only reasonable inference from its holding is that it was misapplying the standard of Section 309(c) to a Section 405 case on the theory that cases arising under the two sections are to be treated as identical. For the reasons set forth in the petition for certiorari, that theory is clearly erroneous. And, as the Government concedes (Gov't. Opp. 2), such a holding would present an important question for review. If, on the other hand, the Court was proceeding in complete confusion as to the nature of the case before it (as the Government implies) or was merely engaging in *obiter dicta* in the dispositive portion of its decision (as respondent suggests), it would appear that the court below has so far departed from the proper course of judicial administration that this Court should exercise its supervisory function.

CONCLUSION

For the foregoing reasons, and those stated in the petition for certiorari, the petition should be granted. If this Court is of the view that there is doubt as to the actual holding below, it is respectfully suggested that the decision below be vacated and the case remanded in order to give the court below an opportunity to reconsider its decision in light of the applicable statutory standard.

Respectfully submitted,

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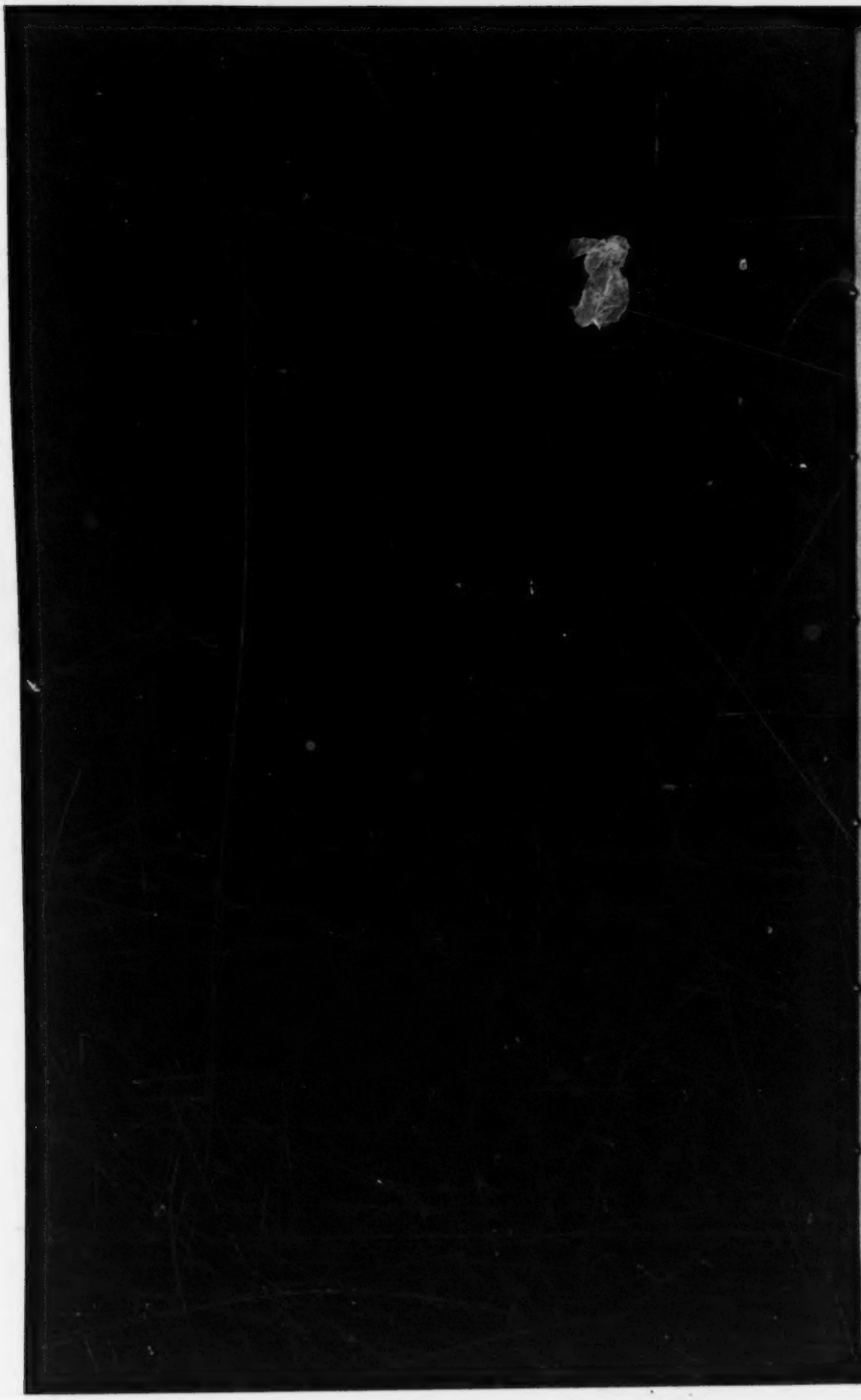
February 19, 1957



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Supreme Court of the United States

OCTOBER TERM, 1956

No.

MCCLATCHY BROADCASTING COMPANY, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Initial Decision of the Examiner (R. 15) is unreported. The Decision of the Federal Communications Commission (R. 55) is unofficially reported at 9 Pike & Fischer R.R. 1190. The original opinion of the Court of Appeals (R. 341, App. 1) and the opinion of the Court of Appeals on rehearing (R. 351, App. 9) are not yet received.

JURISDICTION

The original judgment of the Court of Appeals was entered on January 27, 1956. A timely petition for

rehearing was granted on May 10, 1956, and on the same date the original judgment was vacated. (R. 350) Following rehearing, the judgment of the Court of Appeals was entered on November 1, 1956. (R. 361, App. 18). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission, after a comparative hearing between two competing applicants for a television station, has the power to award the grant to one applicant on the sole ground that the other applicant has newspaper and broadcasting interests in the area involved.

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151, *et seq.*, are set forth in the Appendix, *infra*, p. 19.

STATEMENT

On July 23, 1952, the Federal Communications Commission designated for consolidated hearing the mutually exclusive applications of McClatchy Broadcasting Company and Sacramento Telecasters, Inc., for a new television station to operate on Channel 10 in Sacramento, California.[1]

After a 48-day hearing, the Examiner released an Initial Decision granting the application of McClatchy

[1] McClatchy Broadcasting Company, petitioner, will sometimes hereinafter be referred to as "McClatchy;" the Federal Communications Commission, respondent, will hereinafter be referred to as "Commission;" and Sacramento Telecasters, Inc., intervenor below, will hereinafter be referred to as "Telecasters."

and denying the mutually exclusive application of Telecasters (R. 15, 54). The Examiner concluded that both applicants met the minimum statutory qualifications (R. 15), and then proceeded to determine, on a comparative basis, which of the two applications should be granted.

The Examiner found McClatchy superior to Telecasters in all areas where a significant difference existed between the applicants, save one—diversification of the media of mass communication (R. 52-53). Although the Examiner awarded Telecasters a preference on this factor, he concluded that McClatchy was not disqualified from receiving a grant inasmuch as (1) McClatchy had not evidenced any monopolistic practices in the operation of its broadcast facilities or its newspapers; (2) McClatchy had not evidenced any monopolistic tendencies; and (3) McClatchy clearly would not have a local monopoly of the media for mass communication in view of the "multiplicity" of other broadcasting stations and newspapers in the area to be served (R. 43-44). The Examiner awarded McClatchy decisional preferences in three separate areas of comparison as follows: (1) its methods of ascertaining audience program requirements and preferences is more realistic and far superior to that of Telecasters (R. 45-46); (2) its proposed television "operation will be integrated into a large well-organized and eminently experienced public information organization that will offer advantages to its personnel and afford a background of know-how concerning the utilization of broadcast equipment and facilities that a newcomer to the field could not hope to match" (R. 44-45); and (3) McClatchy's long record of service in the public interest gives assurance

that the facility sought will render an outstanding service (R. 46-53). The Examiner held the latter preference determinative.[2] He concluded that the program service rendered by McClatchy's broadcast facilities had been consonant with the responsibilities of a licensee; that in the non-programming field McClatchy's record of performance was "truly impressive"; and, in the field of public service, McClatchy's record, "viewed in its entirety, is symbolic the type of activitiy that has made radio the great medium it is today" (R. 46, 52).

On October 4, 1954, after exceptions had been filed and oral argument had before the Commission, that agency released its Decision (R. 55), reversing the Examiner's Initial Decision and granting Telecasters' application (R. 118-119). The Commission found both applicants basically qualified and gave McClatchy

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[2] The following language of the Examiner summarizes McClatchy's public service record:

> "The foregoing record of technical expertise, improvement of facilities, experimentation with new developments and media, willingness to enter new fields, disposition to keep faith with audience at financial loss, initiative and cooperation concerning such problems as national defense and allocation of channels, desire for accurate knowledge of listener preferences and requirements, and civic activity, coupled with the fact that it has lived up to its obligations programwise, amply support McClatchy's contention that it is entitled to preference because of its long history of operation in the public interest. We might add that, in our opinion, the above record, viewed in its entirety, is symbolic of the type of activity that has made radio the great medium it is today. To those who would say such activity has been dictated by self-interest we reply that, if so, it has been an enlightened self-interest and highly beneficial to the public." (R. 52).

preferences as follows: (1) McClatchy was awarded a preference because of "... the integration of its television operation with a large and experienced organization, and the broadcast experience available as a result thereof" (R. 108-109); and (2) McClatchy was awarded a preference because it was more likely to effectuate its proposal than was Telecasters (R. 114). Up to this point in the Decision, Telecasters received no final preference on any comparative factor.[3]

The Commission then came to the consideration which it held "determinative" of the proceeding (R. 114). It noted that McClatchy has newspaper and

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[3] It should be noted that the Commission's discussion leading to the conclusion numbered (2) above, is embraced in three paragraphs of the Decision, *viz.*, Paragraphs 9-11 of the Conclusions, R. 109-114. The Commission *assumed* that Telecasters was entitled to what might be termed "intermediate preference" with respect to local ownership, participation in civic life of the community, integration of ownership with management, and diversification of business background. (R. 112-113). (Note that the Commission stated that "*If we were to compare* the applicants solely on these bases of criteria . . . we would find that Telecasters merits a distinct preference." (Emphasis supplied.) But no such comparison was ever made and the assumed conclusion is, therefore, baseless.) Moreover, those factors only "aid . . . in the evaluation of the applicants with respect to their awareness and responsiveness to the needs of the community and the probability of the effectuation of their program proposals." (R. 109-110). They are "only guideposts or presumptions for determining which applicant is more likely to carry out its proposal and remain alert to the area's needs." (R. 113). These "intermediate preferences" awarded Telecasters were not only without basis in this record, but, if accepted, were overridden by McClatchy's "outstanding record affirmatively demonstrating performance," giving McClatchy the final preference with respect to reliability of its proposals. (R. 114).

radio broadcasting interests in and around the area to be served,[4] while Telecasters has no such interests. It then held as follows:

> "The facts in this case boil down to a comparison of an applicant with an excellent record of past performance with all the attendant advantages that accrue, and on the other hand, an applicant without a record of past performance but affording assurances that its operation will be in the public interest. We conclude that under these circumstances *the superiority McClatchy has demonstrated with respect to certain factors does not outweigh the comparative advantage adhering to Telecasters because of its freedom from ties with other radio, newspaper and television interests in Sacramento as well as throughout the Central Valleys.* Telecasters will bring a new view and another directly competitive service to the area which will not be just a further extension of an existing service." (Emphasis supplied.) (R. 118).

In sum, the Commission denied McClatchy's application and granted that of Telecasters, in spite of its findings that McClatchy has a long history of service in the public interest; it proposed a well-balanced program schedule; and there was more likelihood that McClatchy would effectuate its proposals. And the Commission took this action on the basis of a "policy" which, as revealed in its Decision, favors diversity of

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[4] See Commission's Finding No. 29 (R. 80-81) and Conclusion No. 14 (R. 116-117). The Commission did not deny, but apparently adopted, the Examiner's Findings that McClatchy had no monopoly of the media of mass communications in the area, that no threat of such a monopoly existed, and that McClatchy did not engage in monopolistic practices or evidence monopolistic tendencies. *Cf.*, R. 115.

the media of mass communications for diversity's sake alone.[5]

McClatchy took a timely appeal to the Court of Appeals pursuant to the provisions of Section 402(b)(1) of the Communications Act of 1934, as amended (48 Stat. 1093, 47 U.S.C. § 402(b)), and Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. § 1009). The Court of Appeals, although finding much "in support of the examiner's position concerning diversification of control" (R. 347, App. 6), affirmed the Commission's Decision. The court, relying on its prior decision in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 89 U.S. App. D.C. 13, 189 F.2d 677 (1951), held that "the Commission is entitled to consider diversification of control [of the media of mass communications] in connection with all other relevant facts *and to attach such significance to it as its judgment dictates.*" (Emphasis supplied.) And the court further stated that

[5] "'• • • But where one applicant is free of association with existing media of communication, and the other is not, the Commission, in the interest of competition and consequent diversity, which as we have seen is a part of the public interest, may let its judgment be influenced favorably toward the applicant whose situation promises to promote diversity.'" (R. 115-116).

"The fact that there may be some diversification of ownership in the communities as a result of the existence of a competing newspaper and other individually owned broadcast stations does not mean that the principle of encouraging further diversification is no longer valid. . . ." (R. 117).

"'. . . where there is a choice between two applicants, one of whom has a television station and another which does not, public interest is better served by granting a license to the newcomer other factors being substantially equal rather than to the person already having a television station. • • •'" (R. 117-118).

"the Commission is free to let diversification of control of communications facilities turn the balance, if it reasonably concludes that it is proper to do so." *Ibid.* Rehearing was granted, but the court again affirmed the Commission's decision (R. 353, App. 11).[6]

REASONS FOR GRANTING THE WRIT

Introduction

Despite the superiority of McClatchy in every area of comparison where final preferences were awarded,[7]

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[6] In its order granting rehearing, the Court of Appeals consolidated this case (Court of Appeals No. 12,470) with an appeal in a companion case (Court of Appeals No. 12,637). In its opinion of October 18, 1956, the court first considered this case (No. 12,470) on rehearing, and again affirmed the Commission. The court then considered the companion appeal (No. 12,637) and reversed the Commission. Telecasters, the intervenor in both cases in the Court of Appeals, has filed a petition for a writ of certiorari in No. 12,637, which petition is presently pending before this Court as No. 694, 1956 term.

[7] The preferences which were given McClatchy were characterized as "slight" by the Commission in its decision (R. 109, 114). Petitioner argued below that the Commission was arbitrary in these characterizations, and moreover that it should have been preferred in numerous other areas of comparison.

The Court of Appeals noted that the Commission "did not find McClatchy superior in every area of comparison save that of diversification", and that the Commission "found McClatchy superior in some respects and Telecasters superior in some . . . ." These statements may be thought to infer that Telecasters was awarded one or more "final" comparative preferences aside from diversification. Such an inference is refuted by the record. The preferences which the Commission attributed to Telecasters were mere assumptions on the Commission's part and, moreover, were only "intermediate" in character. See note 3, *supra*. The court's decision is premised ultimately on the conclusion that, aside

save in the area of diversification of mass media, the Commission concluded that McClatchy was to be denied the license merely because it was engaged in the businesses of newspaper publication and broadcasting. In order to put this holding in proper perspective, it is important to note the following uncontroverted facts:

1. Neither the Commission nor the Examiner found that a monopoly of the media of mass communication in the area involved would be established or threatened by a grant to petitioner.[8] A graphic demonstration that no threat of monopoly of the mass media in the area is even remotely possible, is the fact that, aside from any media owned by petitioner, there are 28 daily newspapers, 8 Sunday papers, 68 weekly papers, 51 broadcasting stations, and 3 other allocated television stations in the service area of the television station which is the subject matter of this litigation (R. 43-44, 117).

2. It was never contended by any party in the proceeding, nor was it concluded or intimated in either the Initial Decision of the Examiner or the final Decision

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from the diversification issue, the Commission "did not find, on the whole, *preponderant* superiority in either applicant"—that the Commission found McClatchy and Telecasters "*almost* in balance". (Emphasis supplied). (R. 345, App. 4.) Even accepting either the Commission's or the court's characterization of McClatchy's superiority, the fact remains that McClatchy was, to some degree, the better applicant. Therefore, under any view with respect to the degree of McClatchy's supriority, McClatchy should have prevailed over Telecasters if it was error to employ the diversification policy against McClatchy.

[8] The Examiner expressly held that "Neither monopoly nor the threat of monopoly is present here" (R. 43). The Commission, in effect, adopted that finding (R. 115). See note 4, *supra*.

of the Commission, that McClatchy has ever *engaged* in any activity of the type considered indicative of monopolistic intent or conduct.[9]

3. There was no suggestion by the Commission that a grant to the petitioner would have been contrary to the public interest because of a resulting over-concentration of control of mass communication media. Petitioner recognizes that the Commission has the power to adopt rules "to limit the number of stations consistent with a permissible 'concentration of control' ", for purposes of "public protection against such concentration." *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956). But a grant to petitioner of the license here sought would not have violated the Commission's Multiple Ownership Rules which were approved by this Court in the *Storer* case, *supra*. McClatchy was seeking its first VHF television facility, while the Rules permit a single licensee to have a total of five such facilities.[10] While the policy against concentration of broadcast facilities in the hands of a few is, perhaps, related to the policy

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[9] The Examiner's words, uncontradicted by the Commission or any evidence in the record, were as follows:

> "This record is barren of any evidence that McClatchy has ever engaged in any of those activities frequently associated with monopolistic conduct in the public information field, e.g., cut-throat rate slashes, personnel pirating, violent interference with distribution, or in fact has ever engaged in any concerted action designed to squeeze competitors out of its fields of activity" (R. 43).

[10] Of the total of seven television facilities authorized for a single licensee, no more than five may be VHF channels. Rules and Regulations of the Federal Communications Commission, Section 3.636, 47 C.F.R. § 3.636. McClatchy is the permittee of one UHF facility—KMJ-TV, Fresno, California.

favoring diversification of mass media, the two are not identical.[11] The Commission in effect has held that, while no improper concentration of control would flow from a grant to McClatchy—*viz.*, no concentration such as would adversely affect the public interest, nevertheless the public interest would be better served by a grant of the license here involved to an otherwise inferior applicant.

In view of these uncontroverted facts, and inasmuch as the Commission's Decision admits the overall superiority of McClatchy aside from any diversification considerations, it is clear that the Commission found against petitioner on the ground of diversification for diversification's sake alone.[12] The Commission's only reason for preferring Telecasters was that Telecasters' principals were engaged in other types of business activities, while McClatchy was engaged, albeit admirably, in serving the public through mass media. This petition seeks review of the Commission's power and authority under the law to deny a grant to an applicant, found otherwise superior to its competitor in a comparative proceeding, *solely* because of its ownership of broadcasting stations or newspapers.[13]

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[11] And see note 25, *infra*.

[12] See note 5, *supra*.

Petitioner concedes that, if its past record had revealed misconduct either indicating monopolistic purpose or any other untoward activity, the Commission could properly have made adverse conclusions on these scores and weighed these conclusions against the applicant. See *Mansfield Journal Co.* v. *Federal Communications Commission*, 86 U.S. App. D.C. 102, 180 F.2d 28 (1950).

[13] Petitioner recognizes that the Court of Appeals stated that the Commission "did not deny it [McClatchy] the construction permit solely because of its ownership of newspapers and broadcasting

I.

The Decision of the Commission, Affirmed by the Court Below, Represents a Major and Dangerous Extension of Previous Commission Policy

Never before in the entire history of federal radio regulation has the Commission held that an applicant otherwise superior to its competitor in a comparative hearing should be denied solely because of its interests in other media. Until the year 1940, just prior to the time the Commission commenced its abortive

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stations" (R. 345, App. 4). But there the court only had reference to the fact that Telecasters was assumed to have certain factors in its favor. However, as previously noted, those factors, in any event, were merely "presumptive" and "intermediate", and were overridden by McClatchy's "final" preference in the area of reliability. See notes 3 and 7, *supra*. Moreover, the court accepted the Commission's statement of the question presented on appeal. That question admitted that the Commission found "differences" between McClatchy and Telecasters, aside from the diversification issue, although those differences were only "slight" (R. 346, App. 5). Certainly in accepting that statement of the question the court understood that, while the "differences" may have been merely "slight", they were, nevertheless, ultimately in McClatchy's favor. The Commission's Decision would permit no other understanding. See again notes 3 and 7, *supra*, and R. 118, where the Commission's Decision states:

> "We conclude that under the circumstances *the superiority McClatchy has demonstrated* with respect to certain factors does not outweigh the comparative advantages adhering to Telecasters because of its freedom from ties with other radio, newspaper, and television interests. . . ." (Emphasis supplied.)

Accordingly, the Commission reached its conclusion by weighing McClatchy's superiorities against only one thing—Telecasters' freedom from mass media associations.

"newspaper investigation",[14] there was, as a general rule, no effort made to penalize applicants because of ownership of newspapers or other broadcast facilities.[15] In many cases the ownership of other mass media was a factor in favor of an applicant over its competitor, as it was recognized that mass media applicants have

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[14] On March 20, 1941, the Commission issued its Order No. 79, F.C.C. Mimeo No. 48496, which was later supplemented by Order 79-A, F.C.C. Mimeo No. 79-A, July 1, 1941. These Orders commenced (in the guise of a rule-making proceeding) the so-called "newspaper investigation." (See App. 53, 55.)

The authority of the Commission to consider the subjects outlined in Orders 79 and 79-A was tested in *Stahlman* v. *Federal Communications Commission*, 75 U.S. App. D.C. 176, 126 F.2d 124 (1942), and although the court upheld the Commission's authority to conduct its proposed investigation, it was made clear that the Commission could not promulgate a rule or policy, the result of which would be to place applicants in a proscribed class merely because of their other lawful business interests.

The Commission issued its public notice terminating the newspaper investigation after this Court's decision was handed down in the *Stahlman* case (App. 57). This notice recited that, while the Commissoin had decided not to adopt any general rule with respect to newspaper ownership of broadcast stations, and while the Commission did not feel that it should deny a license merely because the applicant is engaged or interested in a particular type of business, it did not intend to permit concentration of control of broadcast facilities in the hands of a few to the exclusion of the many who may be *equally well qualified* to render such public service.

[15] See *e.g.*, *Bell Broadcasting Company*, 3 F.C.C. 90 (1936); *Mason City Broadcast Company*, 3 F.C.C. 116 (1936); *Finlay and Finlay*, 4 F.C.C. 356 (1937); *Telegraph Herald*, 4 F.C.C. 392 (1937); *Northwestern Publishing Company*, 5 F.C.C. 321 (1938); *Bend Bulletin*, 5 F.C.C. 447 (1938); *Dorrance D. Roderick*, 5 F.C.C. 563 (1938).

an intimate knowledge of the community and, hence, are capable of rendering a better service to the public.[16]

It was not until 1940 that the Commission's so-called policy in favor of diversification of control of the media of mass communication began to assume significance. Since that time, the policy has been involved in a tremendous number of Commission cases.[17] However, never until now has it been held that the bare policy of diversification was so omnipotent that it warranted a grant to a competitive applicant who received no final preference on any other comparative ground, and who, instead, was inferior in all of the other areas where final preferences were awarded.[18] In fact, there have been

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[16] See *e.g.*, *Hartford Broadcasting Co., Inc.*, 2 F.C.C. 330 (1936); *United States Broadcasting Corp.*, 2 F.C.C. 208 (1935).

[17] See 2 Pike & Fischer R.R., Digest § 53.24, pp. 2551-2676.

[18] The major Commission cases since 1940 in which non-mass media applicants were preferred partially on the basis of the diversification factor clearly reveal that in these cases the non-mass media applicants prevailed either because a local monopoly was threatened or because they were superior on other grounds as well. See *Stevens and Stevens, d/b/a Port Huron Broadcasting Co.*, 5 F.C.C. 177, 182 (1938) (Broadcast experience and priority of filing); *Southern Tier Radio Service, Inc.*, 3 Pike & Fischer R.R. 211, 221 (1946) (Broadcast experience); *The Observer Radio Co.*, 3 Pike & Fischer R.R. 234, 242 (1946) (Better operating plans, staff, more integration of ownership and management and local ownership); *Voice of Augusta, Inc.*, 3 Pike & Fischer R.R. 434, 446 (1946) (Better program plans and local ownership); *Beatrice Cobb*, 3 Pike & Fischer R.R. 540, 543 (1946) (Integration of ownership and management); *Nashville Radio Corp.*, 3 Pike & Fischer R.R. 515, 522 (1946) (Integration of ownership and management, local ownership, more complete showing); *Roderick T. Peacock, Sr.*, 3 Pike & Fischer R.R. 564,

cases where the Commission did not consider diversification at all in granting licenses to otherwise superior applicants, and in all other cases, superior mass-media applicants received grants so long as no local monopoly situation was threatened.[19]

By 1951 the diversification principle was applied, as a general rule, "only when a grant would tend toward creating a local monopoly in the channels for the public expression of opinion and in the dissemination of news and information . . ." *Barnes and Weiland,* 8 F.C.C. 46, 54 (Dissenting Opinion, 1940). And see *Orlando Daily Newspapers, Inc.,* 3 Pike & Fischer R.R. 624, 631 (1951); *Lubbock County Broadcasting Co.,* 6 Pike & Fischer R.R. 949, 983 (1951); and *Hearst Radio, Inc.,* 6 Pike & Fischer R.R. 994, 1031, 1032 (1951).[20] Other Commission cases give

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571 (1946) (Local ownership, better program plans); *Arkansas-Oklahoma Broadcasting Corp.,* 3 Pike & Fischer R.R. 479, 484 (1946) (Threat of local monopoly and evidence of monopolistic tendency by newspaper applicant); *Meadville Tribune Broadcasting Co.,* 3 Pike & Fischer R.R. 544, 548 (1946) (Newspaper applicant controlled by the only two local papers and no other local radio station).

[19] See *e.g., Commercial Radio Equipment Co.,* 3 Pike & Fischer R.R. 310 (1946); *Permian Basin Broadcasting Co.,* 3 Pike & Fischer R.R. 324 (1946).

[20] This proceeding involved the application of Hearst for a renewal of license and the application of Public Service Radio Corporation for the facilities licensed to Hearst. The applications were consolidated for comparative hearing. Section 307(d) of the Act then provided that the granting of applications for renewal of license shall be limited to and governed by the same consideration which affect the granting of original applications. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940). Therefore, the principles evolved in *Hearst* should be no different than if both applicants were apply-

further evidence of the limitations on the diversification principle which previously obtained.[21]

Briefly stated, the diversification factor in comparative cases has been receiving increasingly more significance from the Commission over the past fifteen years. Until the present case, that factor was consistently related to the public interest in terms of monopolization of local channels of public information and expression. The factor has not only grown tremendously in its importance in the eyes of the Commission, but, in the present case, it has now been elevated so that it can be applied by itself, without relating it to monopolization or even to over-concentration of broadcast control, as a "determinative" consideration, overriding any contrary superiorities.

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ing for the facilities for the first time. The Commission cites principles evolved in Hearst to be of general applicability. See *WJR, The Goodwill Station, Inc.*, 9 Pike & Fischer R.R. 227, 260d (1954).

[21] See *Providence Journal Co.*, 3 Pike & Fischer R.R. 1509, 1511-1512 (1947), where the Commission stated that, "In view of the fact that 6 AM and 5 other FM broadcast stations have been authorized in Providence and Pawtucket, it is apparent that a grant of the Providence Journal Company's application would not result in granting to that applicant a monopoly over the broadcast of news"; *Midland Broadcasting Co.*, 3 Pike & Fischer R.R. 1961 (1948), where the Commission showed its concern with monopoly in the form of community influence; *The Hampton-Hampshire Corp.* (WHYN), 4 Pike & Fischer R.R. 504, 517 (1949), where the Commission stated that, "The record does not disclose that the applicant has indulged in any monopolistic practices in the past . . ."; and *Belleville News-Democrat*, 4 Pike & Fischer R.R. 1043, 1058b (1950), where it was stated that, "there is no basis for concluding that the applicant would engage in monopolistic practices or that the grant of this application would not serve the public interest."

II.

The Decision Below Represents a Major and Dangerous Extension of Previous Appellate Court Decisions Touching the Question Presented, and Is Not in Accord With Previous Pronouncements of This Court

Prior to the present decision of the Court of Appeals, the leading case touching the question of the legality of the Commission's diversification policy was *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 89 U.S. App. D.C. 13, 189 F.2d 677, cert. denied, 342 U.S. 830 (1951). In that case the court upheld the Commission's power to attach significance to or let its judgment be influenced by the fact that one applicant is disassociated from existing media of mass communication while the other is not. The court held that diversity might be considered as an element of preference, and that the Commission, in the interest of competition, might let its judgment be influenced favorably toward an applicant who had no connection with existing media. There was no intimation by the court that it was overruling *Tri-State Broadcasting Co., Inc.* v. *Federal Communications Commission,* 68 App. D.C. 292, 96 F.2d 564 (1938), or *Stahlman* v. *Federal Communications Commission,* 75 U.S. App. D.C. 176, 126 F.2d 124 (1942), wherein the Commission was flatly warned that it could not deny an application because the applicant is otherwise engaged in the dissemination of news. Nor did the court indicate in *Scripps-Howard* that it was giving the Commission *carte blanche* to deny a superior applicant solely because of the diversity factor. But instead, it held that diversity was merely an element of preference, which is important only as it affects the service to be

provided. The end result—the service to be provided —was still the paramount consideration.[22]

Thus, the decision in *Scripps-Howard* was not itself broad enough to control the decision in the instant case. There, diversification was only one of several factors favoring the grant to the successful applicant, while in the instant case it was the *only* factor relied upon as favoring a grant of Telecasters' application. The present case represents a major and dangerous extension of the policy which was before the Court of Appeals in *Scripps-Howard*. The court below has now approved the Commission's power to hold one applicant superior to another and nevertheless to award the grant in issue to the other simply because the superior applicant has mass-media associations.

In the instant case, the Commission and the court below have enlarged the scope of *Scripps Howard* to an extent where public interest is not the controlling factor in granting an application. Instead, an ill-defined and unreasoned policy of prejudice against owners of newspapers and radio stations has been adopted as the determinative factor in deciding hearings. If *Scripps Howard* is authority for denying an otherwise superior applicant because of its connection

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[22] This Court denied Scripps-Howard's petition for a writ of certiorari, 342 U.S. 830. In its petition, Scripps-Howard contended that it had been disqualified because of its newspaper affiliation. Petition in Case No. 228, 1951 Term, pp. 13-14. The Commission, in its brief in opposition to the petition, stated that Scripps-Howard had not been disqualified; that diversity had been considered only as one element, *among others, favoring* the opposing applicant in determining whether the grant was in the public interest; and that such consideration of the diversity factor was within the Commission's power. Government's Opposition to Petition for Certiorari in Case No. 228, 1951 Term, pp. 8-9.

with other media of mass communication, that decision is contrary to law.

The two other principal circuit court decisions in the area, which, like the present case, were decided by the Court of Appeals for the District of Columbia Circuit, are *Stahlman* v. *Federal Communications Commission, supra,* and *Tri-State Broadcasting Co., Inc.* v. *Federal Communications Commission, supra.* Neither of those cases intimate that the Commission may decide against a mass-media applicant or any other applicant solely because of his or its other business interests. Rather, both cases have language indicating the contrary. For example, in *Stahlman* the court said:

> "For we have previously held that there is nothing in the [Communications] Act which either prevents *or prejudices* the right of a newspaper, as such, to apply for and receive a license to operate a radio broadcast station. *Tri-State Broadcasting Co.* v. *Federal Communications Comm.,* 68 App. D.C. 292, 96 F.2d 564. Further consideration confirms that view." (Emphasis supplied.) 75 U.S. App. D.C. 176, 179, 126 F.2d 124, 127.[23]

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[23] The court went on to say that, although the Commission has wide power to grant licenses, this power is subject to the requirement that it act as public necessity and convenience require:

> "This, however, as the Supreme Court remarked [*in Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470 (1940)], is not a grant of unlimited power, . . . It does not embrace and *should not be extended by implication* to embrace a ban on newspapers as such, for in that case it would follow that the power to exclude exists also as to schools and churches; and if to these, the interdict might be applied wherever the Commission chose to apply it." (Emphasis supplied).

This Court has never passed on the propriety of the diversification policy as a comparative factor in any context, and certainly has never been presented with the question involved in the present case. Admittedly, the Court has had occasion to note the existence of the basic policy. See *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 363-4 (1955);[24] *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission, supra.* But the major and dangerous extension of the policy as applied in this case has never been before this Court.[25]

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[24] The *Allentown* case was cited in *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, 203, note 12. However, in view of the issues and opinions in *Allentown* and *Storer*, that note cannot be interpreted as a holding or even a *dictum* in approval of any phase of the diversification policy.

[25] As previously noted, the Court has approved the Commission's Multiple Ownership Rules. *United States* v. *Storer Broadcasting Company*, 351 U.S. 192 (1956). Aside from the fact that that case involved the legality of limitations against over-concentration of broadcast interests, as opposed to a bare policy favoring diversification of mass-media, another distinction between *Storer* and the present case is likewise important. The Multiple Ownership Rules were adopted by the Commission pursuant to a rule-making proceeding which included "extensive administrative hearings." *Id.*, at 205. The *Storer* case does not intimate that the Commission could have adopted a numerical limitation of general application on the permissible number of stations under the control of one licensee by the mere announcement of a policy to that effect. In the present case the Commission has applied a policy of apparent general application to the effect that mere ownership or control of other media of mass communication, without any accompanying threat of monopoly or over-concentration of control of mass-media, is necessarily undesirable. And this policy has evolved without benefit of rule-making proceedings. *Cf. Stahlman* v. *Federal Communications Commission*, 75 U.S.

The single statutory criterion which ultimately is to govern the Commission's licensing power is the "public interest, convenience, or necessity." 47 U.S.C. §§ 307, 309 and 310. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. * * * The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services . . ." *Federal Radio Comm.* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933). And this Court has said, in speaking of the duties of the Commission in comparative cases:

> ". . . 'the commission must determine from among applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138, n. 2 (1940)."[26]

Still further, in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), the Court pointed out that "the broadcasting field is open to anyone." Thus, the service to be provided, rather than the various criteria selected by the Commission as determining who should be

App. D.C. 176, 126 F.2d 124 (1942), where the court specifically pointed out that the Commission could not adopt a rule or policy which would prejudice the right of a mass-media applicant to obtain a grant.

[26] See also *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

preferred among competing applicants, is the important consideration. *Federal Communications Commission* v. *Pottsville Broadcasting Co., supra.*

But in the instant case, the Commission, with the subsequent approval of the Court of Appeals, has not granted the application which is likely to bring the best service to the public. No suggestion has been made by either the court below or the Commission that Telecaster's would provide the better service. Rather, it is conceded that McClatchy "[I]n a measure" will "give more . . . service." Id., at 138. Nevertheless, without relating its action to the "public interest, convenience or necessity," except by a mere pronouncement that the action will benefit the public, the Commission has granted the television facility here in issue to Telecasters, the inferior applicant.

Moreover, it is settled that the Commission, in the proper exercise of its statutory authority, may not adopt a policy, or dispose of a decision, on the basis of "[G]eneralities unrelated to the living problems of radio communication." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 (1943). Before applying a policy, the Commission "must at least warrant, as it were, that . . . [the policy] would serve some beneficial purpose such as maintaining good service or improving it." *Federal Communications Commission* v. *RCA Communications,* 346 U.S. 86, 97 (1953). Nowhere has the Commission indicated here how the public interest would be better served by a grant to Telecasters over McClatchy. The Commission has simply made a gratuitous announcement to the effect that a "new view" (even where there are other and presumably adequate existing "views"), and "another directly competitive service" (even

where there is adequate competition among existing services) are in the public interest (R. 118).[27] The ruling of the Commission is in excess of its statutory powers because premised upon a bare policy favoring diversification of the media of mass communication—a policy which, as an end in and of itself, is wholly unrelated to public interest.[28]

III.

The Question Presented Is of Tremendous Importance in the Future Administration of the Communications Act

That the diversification principle, as here extended and applied, is far reaching and important in the administration of the Communications Act, is patent

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[27] With respect to whether additional competition, or any competition for that matter, is necessarily in the public interest, see *Federal Communications Commission* v. *R.C.A. Communications*, 346 U.S. 86 (1953). "Merely to assume that competition is bound to be of advantage in an industry so regulated and so largely closed as is this one, is not enough." *Id.*, at 97.

[28] The Examiner's view of the diversification policy was stated in these terms:

> "The dissemination of public information involves a process of selection and presentation wherein the human element plays an important role and the end product, both quantitatively and qualitatively, inevitably bears the imprint of the producer. In a society dedicated to the free exchange of ideas it is imperative, that, when avoidable, the public not be placed in a position of dependence upon a single source, or narrow group of sources, for its day-to-day information. Diversification of the ownership of public information media, of course, protects against such monopolistic situations. *But diversification is not an end in and of itself and where monopoly, or the threat of monopoly, does not exist such precedents lose force.*" (Emphasis supplied.) (R. 43).

from a consideration of the large number of comparative broadcast cases which come before the Commission in which a newspaper or experienced broadcast applicant is involved. For example, as of December 31, 1956, there were at least 20 comparative television proceedings alone in hearing status before the Commission in which diversification of the media of mass communications is potentially involved.[29] Further, although it is impossible to prognosticate as to the future frequency of a diversification issue in comparative proceedings before the Commission, past experience shows that the issue is of increasing significance. See *supra*, Part I. Under the decision below, the Commission has a free hand, so to speak, to deny the mass-media applicant in any one or all of those cases, or the mass-media applicant in any future case, no matter how superior such applicant is in comparison to other competing applicants. And, of course, the Commission can do so without regard to whether or not it finds that a grant to the mass-media applicant would be contrary to the public interest because of a resulting undue concentration of control of mass media, and further without regard to whether a grant to the mass-media applicant would threaten monopolization of local mass media. The decision invites arbitrary action and discrimination against experienced broadcasters and newspaper owners, both when applying for new facilities and even when applying for renewals of existing facilities.

The Commission has applied a factor in choosing beween two qualified applicants which relates not to the type of service which either will render to the

[29] See F.C.C. document no. 40263, "Television Applications in Hearing Status December 31, 1956."

public but to some obscure objective which the Commission has itself not seen fit to define or delineate. This factor of diversification of media is purely an economic doctrine, conceived by the Commission apparently in 1940 and applied since then in many cases as one of the criteria by which the better qualified applicant is supposedly chosen. However, the Commission, in the present case, has elevated diversity of media as a factor in so far as its weight and elasticity are concerned to such an extent that diversity has outweighed all other factors which the Commission employs to choose between competing applicants for a facility. The Commission has thus created a bludgeon with which it may strike down an applicant regardless of how superior it may be in any of the usual areas of comparison, i.e., past and future programming, sensitivity to public needs of the community, experience, proposals of technical facilities, etc. In effect the Commission seeks to use the diversity of media factor in such a way that arbitrary and capricious action results. The Commission must under the law have some logical and reasonable basis for evaluation of factors of preference. Otherwise it could arbitrarily pick any factor at will and make such factor determinative of a decision irrespective of the relation of such factor to the public interest to be served.

In this connection it is important to note the broad language employed by the Court of Appeals in approving the use of the policy of diversification. The Court stated that the Commission is entitled to consider diversification and "to attach such significance to it as its judgment dictates"; and further that diversification may be the determinative factor in a comparative case if the Commission "reasonably concludes that it is proper to do so" (R. 347, App. 6).

Of course, if the diversification policy can be applied legally to defeat a superior applicant, in the absence of a showing of undue control or threat of monopolization, the Commission has some discretion with respect to the weight to be accorded the policy in a particular case. However, the fact that the Commission must exercise discretion when applying legal criteria, makes it more important to examine the propriety of the criteria it seeks to apply. And where, as here, the criteria under examination has extensive ramifications in terms of frequency of application, and, in effect, amounts to discrimination against a large group of interested broadcast applicants, it is doubly important that the legality of the Commission's policy receive final judicial scrutiny.

The diversification policy as extended and applied in the present case has the net effect of excluding the applicant for a broadcasting facility who is the best qualified to serve the public, by subordinating public interest to some theoretical principle having no basis in law or experience. The policy discriminates against those who pioneered the development of commercial radio and television broadcasting — *viz.*, today's experienced broadcasters—on the basis of nothing more than the *ipse dixit* of authority.

IV.

The Commission's Application of the Diversification Policy Is Contrary to Congressional Intent

Additional evidence showing the diversification policy, as here extended, to be beyond Commission authority is contained in certain recent legislative history. The Communications Act was left unchanged by the 1952 amendments to the Act[30] only because the

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[30] 66 Stat. 711, 47 U.S.C.A. § 151, *et seq.*

Commission represented to Congress that it did not discriminate against applicants because of the businesses in which they were engaged.[31] Congress never intended that the diversity factor should be applied in the manner that it has been here. Congress never intended that an applicant should, in effect, be disqualified merely because it was associated with newspapers and other broadcast stations. This is evident from the legislative history preceding the 1952 amendments to the Communications Act.[32]

In 1949, an amendment was proposed to the Communications Act of 1934. This amendment, which was subsequently reported out of the Senate Committee on Interstate and Foreign Commerce of the 81st Congress, 1st Session, as contained in S. 1973, proposed to amend Part I of Title III of the Act by adding the following new section:

> "LIMITATION ON RULE-MAKING POWERS: DISCRIMINATION PROHIBITED
>
> "Sec. 332. No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the Commission and as authorized by law. The Commission shall make or promulgate no rule or regulation of substance or procedure, the purpose or result of which is to effect a discrimination between persons based upon race, religious or political affiliation *or kind of lawful occupation or business association.*" (Emphasis supplied.)

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[31] See S. Rep. No. 741, 81st Cong. 1st Sess. (1949), pp. 2-3, and Conference Report on Communications Act Amendments, H.R. Rep. No. 2426, 82nd Cong., 2nd Sess. (1952), 18.

[32] See App. 20 *et seq.*, for a digest of pertinent portions of the legislative history of the Communications Act.

In the Senate Report to accompany S. 1973 the Committee on Interstate and Foreign Commerce made the following statement with regard to the elimination of the so-called anti-discrimination section:

> "The committee deems it important to point out why this section was dropped from the bill . . .
>
> "In testimony on the bill (S. 1973) before this committee, the Commission spokesman pointed out that present Commission practice and procedure has been in accord with the proposed section for several years; that they have serious doubts of the constitutionality of any rule which would prohibit the granting of a license to anyone because of kind of lawful occupation; and that in any event they could not constitutionally do what the proposed section . . . would have prohibited them from doing.
>
> "The committee is impressed by the validity of this testimony. In view of the positive nature of the affirmations by the Commission that its existing procedure is in accord with that which had been intended by the original language, some question was raised as to whether or not the proposed new language might not be construed or interpreted to provide a different or modified procedure from that now being followed. The committee, therefore, decided to eliminate the proposed section. *It should be distinctly understood that in eliminating this section the committee has done so solely because the Commission is now following the procedure which was outlined in the section, has testified that it intends to follow that procedure, and that it is of the opinion that it has no legal or constitutional authority to follow any other procedure.*"[33] (Emphasis supplied.)

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[33] S. Rep. 741, 81st Cong., 1st Sess. (1949), 2-3. (App. 27-28).

In 1952, the Congress again considered the question of amending the Communications Act so as to provide for an anti-discrimination clause. Senate Bill 658, to further amend the Communications Act of 1934, was referred to the Committee on Interstate and Foreign Commerce of the House of Representatives. In its section-by-section explanation of S. 658, as contained in its Report, we find the following explanation of the purpose of the anti-discrimination clause (H.R. Rep. No. 1750 to accompany S. 658, at p. 9):

> "The new subsection deals with the question of how newspapers are to be treated with respect to the granting of construction permits and station licenses. It provides that the Commission shall not make or promulgate any rule or regulation *of substance or procedure,* the purpose or result of which is to effect a *discrimination between persons based upon interest in, association with, or ownership of any medium primarily engaged in the gathering and dissemination of information* and that no application for a construction permit or a station license, or for the renewal, modification, or transfer of such a permit or license, shall be denied by the Commission *solely* because of any such interest, association, or ownership." (Emphasis supplied.)

The anti-discrimination section was deleted from the amendment, however. The reason for its deletion is explained in the House Conference Report,[34] as follows:

> "The Senate bill contained no such provision, and the provision is not included in the conference substitute. This provision was omitted

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[34] H.R. Rep. No. 2426, 82nd Cong., 2nd Sess. (1952), 18-19 (App. 29).

> from the conference substitute because the committee of conference felt that it was *unnecessary*. It is the view of the conference committee that under the present law the Commission *is not authorized* to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or association with, a newspaper or other medium for gathering and disseminating information. Also the Commission could not arbitrarily deny any application *solely* because of any such interest or association." (Emphasis supplied.)

As indicated, the Committee of Conference eliminated the anti-discrimination section as being unnecessary, for under the present law the Commission could not discriminate against any applicant merely because of interest in, or association with, a newspaper or other medium for gathering and disseminating information and could not arbitrarily deny an applicant solely because of such interest or association. It is to be noted that this occurred subsequent to the decision in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,*[35] and the Commission's decision in *Hearst Radio, Inc.* (*WBAL*),[36] and that, although the anti-discrimination section was not enacted, there was, in effect, Congressional approval of the decision of the majority in the latter case with regard to the application of the factor of diversification.[37] The majority of the Com-

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[35] 89 U.S. App. D.C. 13, 189 F.2d 677, *cert. denied,* 342 U.S. 830 (1951).

[36] 6 Pike & Fischer R.R. 994 (1951).

[37] See App. 50-51.

mission in that case held that diversification was not a determinative factor for, although Hearst had a multiple broadcast and newspaper interests, they did not have a local monopoly and the common control of a local radio station and newspaper had not been employed adversely to the interests of the listening public.

CONCLUSION

The Commission held in the instant case that McClatchy was the superior applicant, but denied its application on the factor of diversification alone. This is completely contrary to the congressional intent and the statutory standard expressed in the Act. It is pure and simple discrimination based solely on the kind of business in which petitioner is engaged. For the foregoing reasons, it is respectfully urged that a Writ of Certiorari to review the judgment of the court below should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 733

MCCLATCHY BROADCASTING COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1–8) and its opinion on rehearing (Pet. App. 9–18) have not yet been reported. The decision of the Federal Communications Commission (R. 55–119) has not been officially reported; it is unofficially reported at 9 Pike & Fischer, Radio Regulation 1190.

JURISDICTION

The initial judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the Commission's decision and order, was entered on January 27, 1956. The judgment on rehearing, again

affirming the Commission's decision and order, was entered on November 1, 1956. The petition for a writ of certiorari was filed on January 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Federal Communications Commission, in choosing between two mutually exclusive applicants for a television station license, may consider, along with other factors, the fact that one of the applicants has other broadcasting and newspaper interests in the geographical area involved.

STATUTE INVOLVED

Sections 307 (a), 309 (a) and 310 (b) of the Communications Act of 1934, 48 Stat. 1064 *et seq.*, 47 U. S. C. 307 (a), 309 (a) and 310 (b) provide as follows:

> SEC. 307 (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.
>
> * * * * *
>
> SEC. 309 (a) If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.
>
> * * * * *
>
> SEC. 310 (b) No construction permit or station license, or any rights thereunder, shall be

transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title, for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

STATEMENT

Petitioner and Sacramento Telecasters, Inc. ("Telecasters") filed with the Federal Communications Commission mutually exclusive applications for a construction permit for a new television station in Sacramento, California. After full administrative proceedings, the Commission on October 4, 1956, reversing the Examiner's Initial Decision, unanimously granted Telecasters' application and denied that of petitioner (R. 55–119).

The Commission's decision rested on an evaluation of the applicants' qualifications with respect to the various comparative criteria which the Commission has developed over the years as guides to the selection of the best qualified applicant (R. 103–119). The Commission concluded that neither applicant was to be

preferred on its program proposals, proposed staff and equipment, or its methods for ascertaining its listeners' needs (R. 105–8, 114). With respect to the various factors which relate to the likelihood that an applicant will effectuate its proposals and will remain sensitive to the needs of the area, Telecasters was found to be distinctly superior to McClatchy as to local ownership, integration of ownership and management, and participation in the civic affairs of the Sacramento area; McClatchy was found to be superior with respect to the broadcast experience of its principals, and was given substantial credit in this general area of comparison for the outstanding operational record of its several existing broadcasting stations (R. 108–9, 112–114). Finally, because Telecasters would have no connection with any other broadcast station or any newspaper, whereas McClatchy already owned many broadcast stations and newspapers in the general geographical area,[1] Telecasters was held to be substantially superior in terms of diversification of control of the media of mass communications (R. 116–118).

The Commission concluded that McClatchy's experience and record of performance gave slightly more assurance that its program proposals would be ef-

[1] Within the Central Valleys of California, an area approximately 400 miles long and 100 miles wide in which Sacramento is located, McClatchy at the time of the Commission's decision owned five standard broadcast stations, one television station, and three newspapers; in Sacramento itself, McClatchy owns the only 50 kw AM station and publishes one of the two daily newspapers (R. 77–81).

fectuated and that it would remain responsive to the needs of the community than did Telecasters' superiority as to local ownership, integration of ownership and management, and civic participation (R. 113–114). It found, however, that this slight advantage was greatly outweighed by Telecasters' substantial superiority in diversification of control of the media of mass communications (R. 118). Since in all other respects no choice could be made between the applicants, the Commission concluded that the public interest would be better served by a grant to Telecasters (R. 118).

On appeal, the Court of Appeals unanimously affirmed the Commission. It held, *inter alia,* that the Commission could consider, "in connection with all other relevant facts," the diversification of control over the media of mass communications in the comparative evaluation, and that the Commission may "attach such significance to it [diversification] as its judgment dictates" and "is free to let diversification of control of communications facilities turn the balance, if it reasonably concludes that it is proper to do so" (Pet. App. 6–7). The court concluded that, in the present case, the Commission had in fact considered diversification only as one factor among the many it weighed and evaluated (Pet. App. 4–5). After a second oral argument on rehearing,[2] the court,

[2] In its order granting rehearing, the court consolidated the case with another (No. 12,637) involving an appeal by McClatchy from a Commission decision denying McClatchy's petition for reconsideration of an order modifying Telecasters' construction permit to specify new transmitter and antenna sites. The court, in its decision of October 18, 1956, reversed the order denying recon-

on October 18, 1956, again unanimously affirmed the Commission's decision (Pet. App. 9–11).

ARGUMENT

The single question which petitioner raises—whether the Commission may grant a television station license to one of two competing applicants "on the sole ground" that the other applicant has newspaper and broadcasting interests in the area to be served (Pet. 2; see Pet. 11)—is not in fact presented by this case. For, as the Court of Appeals correctly held (Pet. App. 4), the Commission "did not deny it [McClatchy] the construction permit solely because of its ownership of newspapers and broadcasting stations," and "did not find McClatchy superior in every area of comparison save that of diversification of facilities for publishing information." On the contrary, the Commission "found McClatchy superior in some respects and Telecasters superior in some, while in other respects it found no reason for a preference between them" (*ibid.*), and it gave "decisive weight to the factor [of diversification] only after carefully considering all the characteristics and proposals of the two competitors *and finding them almost in balance*" (*id.*, p. 5, italics in original). As noted (see Statement, *supra*, pp. 3–5), this description of the basis of the Commission's decision is correct.

The petition, therefore, presents no novel question, but only the correctness of the application of settled

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sideration and remanded the case to the Commission for further proceedings (Pet. App. 11–18). On January 16, 1957, Telecasters filed a petition for a writ of certiorari to review that part of the judgment (No. 694, this Term).

principles to the facts of this case. For the Commission repeatedly has held that the interests of competing applicants in other media of mass communications in the area are an important factor in determining which grant would best serve the public interest;[3] and the court below, which has exclusive jurisdiction to review Commission licensing orders (Section 402 (b), Communications Act of 1934), consistently has held that, "[i]n considering the public interest the Commission is well within the law when, in choosing between two applications, it attaches significance to the fact that one, in contrast with the other, is disassociated from existing media of mass communication in the area affected * * *." *Scripps-Howard Radio* v. *Federal Communications Commission,* 189 F. 2d 677, 683 (C. A. D. C.), certiorari denied, 342 U. S. 830.[4] This principle represents an

[3] See, *e. g.*, in addition to the cases affirmed on appeal referred to in footnote 4, *infra*, *Port Huron Broadcasting Company*, 5 F. C. C. 177; F. C. C. Public Notice of January 13, 1944, 9 F. R. 702; *Stephenson*, 8 F. C. C. 497; *Bamberger Broadcasting Service, Inc.*, 11 F. C. C. 211; *Southern Tier Radio Service, Inc.*, 11 F. C. C. 171; *Zinn and Golliday*, 11 F. C. C. 419.

[4] Accord: *Plains Radio Broadcasting Co.* v. *Federal Communications Commission*, 175 F. 2d 359 (C. A. D. C.); *Tampa Times Co.* v. *Federal Communications Commission*, 230 F. 2d 224 (C. A. D. C.); *International Broadcasting Corp.* v. *Federal Communications Commission*, 237 F. 2d 205 (C. A. D. C.), certiorari denied 352 U. S. 895; *Columbia Empire Telecasters, Inc.* v. *Federal Communications Commission*, 228 F. 2d 459 (C. A. D. C.); cf. *Pinellas Broadcasting Co.* v. *Federal Communications Commission*, 230 F. 2d 204 (C. A. D. C.), certiorari denied 350 U. S. 1007. The *Scripps-Howard* case is strikingly similar to the instant case. In that case, as here, the losing multiple media applicant had a superior broadcast background, while the prevailing applicant

application to the broadcasting field of the view enunciated in *Associated Press* v. *United States,* 326 U. S. 1, 20, that the First Amendment rests on the assumption that "the widest possible dissemination of information from diverse and antagonistic sources" is essential to the public welfare.[5] See also, *Federal*

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was superior with respect to local residence, integration of ownership and management, civic participation, and diversification.

Petitioner contends (Pet. 26–31) that the legislative history of certain proposed amendments of the Communications Act manifests a congressional intention to preclude the Commission from applying the diversification policy as it did in this case. Those amendments would have prohibited the Commission from promulgating any "rule or regulation * * * the purpose or result of which is to effect a discrimination between persons based upon * * * [the] kind of lawful occupation or business association," or upon "ownership of any medium primarily engaged in the gathering and dissemination of information" (Pet. 26–31). As petitioner notes (Pet. 29–30), however, the amendments were not adopted. The House committee deemed them "unnecessary" because "under the present law the Commission is not authorized" to promulgate any such discriminatory "rule or regulation" and could not "arbitrarily deny any application solely because of any interest or association." H. R. Rep. 2426, 82d Cong., 2d sess. (1952), 18–19. Since the Commission has neither promulgated any rule or regulation relating to the grant of broadcasting licenses to newspapers, nor, as we have shown (see *supra*, pp. 3–5), denied petitioner's application "solely" because of its interests in other mass communication media, this legislative history is not helpful here. Furthermore, at the time that legislation was pending, the Commission was treating diversification as a factor in comparative proceedings, and Congress was so advised. See Pet. App. 23–24.

[5] As the court stated in the *Scripps-Howard* case, *supra*, 683: "Inherent in the thought is the realization that news communicated to the public is subject to selection and, through selection, to editing, and that in addition there may be diversity in method, manner and emphasis of presentation. Such variations may arise from numerous causes."

Communications Commission v. *Allentown Broadcasting Co.*, 349 U. S. 358, 363–364; *United States* v. *Storer Broadcasting Company*, 351 U. S. 192, 203.[6]

There is therefore no merit to petitioner's contention (Pet. 25) that the Commission cannot consider diversification because it is "purely an economic doctrine" having no real relation to the "public interest" standard which is the touchstone for Commission licensing proceedings. Nor is petitioner correct in its claim (Pet. 16) that diversification previously has been considered as a significant factor by the Commission only in situations involving monopoly power. See cases cited, notes 3 and 4, *supra;* cf. *National*

[6] The brief *amicus curiae* of the American Newspaper Publishers Association suggests that this Court in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, laid down a rule that (p. 7) "the public interest and convenience *require* the granting of a license or construction permit, as the case may be, to that applicant who demonstrates its ability to render the best practicable service to the community reached by its broadcasts." This standard, it is urged, does not include consideration of diversification as a factor in comparative proceedings. But the argument is based upon a misreading of *Sanders;* that case holds only that the ability of an applicant to render the best practicable service to the community served is "[a]n important element of public interest and convenience affecting the issuing of a license" (p. 475). This Court in *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216–218 and in the *Allentown* and *Storer* cases, *supra*, has made clear that concentration of the media of mass communication also is a relevant consideration for the Commission in determining which of several competing applicants for broadcasting facilities would best serve the public interest and hence "render the best practicable service to the community." The standard of "best practicable service" hardly precludes consideration of monopoly and diversification factors.

Broadcasting Co. v. *United States,* 319 U. S. 190; *Mansfield Journal Co.* v. *Federal Communications Commission,* 173 F. 2d 646 (C. A. D. C.). Of course, the existence of an undue concentration of control may increase the significance of the diversification factor, just as the existence of numerous other media of communication in the area may detract from its significance. Moreover, as the court below pointed out, an application which merits a preference with respect to diversification will not necessarily prevail; in a substantial number of cases other factors may be found to outweigh this particular advantage.[7]

The weight to be accorded the factor of diversification necessarily depends on the facts of each particular case. In the instant case, diversification assumed greater importance because of the relatively even balance of the two applicants with respect to the other pertinent criteria, and because of Telecasters' wide

[7] The court below stated that its holding "does not mean that the owner of a newspaper is disqualified as a licensee [citing *Stahlman* v. *Federal Communications Commission,* 126 F. 2d 124 (C. A. D. C.)]" or that "the Commission may reject a newspaper's application and grant that of a competing non-newspaper applicant without also considering and comparing all other relevant factors" (Pet. App. 6–7). In several cases, the Commission has selected the applicant associated with other mass media in preference to those having no such association. See, e. g., *Biscayne Television Corp.,* 11 Pike & Fischer, R. R. 1113, appeal pending *sub. nom., Sunbeam Television Corp.* v. *Federal Communications Commission,* Case Nos. 13,180 *et al.,* C. A. D. C.; *The Tribune Co.,* 9 Pike & Fischer, R. R. 719, affirmed, *Pinellas Broadcasting Co.* v. *Federal Communications Commission, supra; Aladdin Radio and Television, Inc.,* 9 Pike & Fischer, R. R. 1; *Orlando Daily Newspapers, Inc.,* 11 F. C. C. 760.

margin of superiority in the area of diversification. But, as the Court of Appeals noted (Pet App. 6), "[t]he responsibility for making the determination [as to the weight to be given the various factors] is committed to the Commission," and "we cannot find that the Commission's decision was arbitrary, capricious or unsupported by substantial evidence" (Pet. App. 8). See also *Pinellas Broadcasting Co.* v. *Federal Communications Commission,* 230 F. 2d 204, 206 (C. A. D. C.), certiorari denied 350 U. S. 1007.

CONCLUSION

The decision below is correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

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No. 733

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

McCLATCHY BROADCASTING COMPANY

v.

FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT SACRAMENTO TELECASTERS, INC. IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8)[1] and its opinion on rehearing (Pet. App. 9-19) have not yet been reported officially. They are unofficially reported at 239 F. 2d 15, 19. The decision of the Federal Communications Commission (R. 55-119)[2] has not been officially reported; it is unofficially reported at 9 Pike & Fischer, Radio Regulation 1190.

[1] "Pet. App." refers to the separate Appendix filed with the petition for a writ of certiorari.

[2] "R" refers to the Joint Appendix filed in the court of appeals.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the commission's decision and order, was originally entered on January 27, 1956. That judgment was vacated on May 10, 1956, when the court of appeals granted the petition for rehearing filed by petitioner. Following rehearing, a judgment was entered on November 1, 1956 again affirming the commission's decision and order. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, where the Commission has concluded after a comparative hearing between two competing applicants for a television station that there are only slight differences between the applicants in other respects, it may attach decisive significance to the fact that the one applicant is dissociated from existing media of mass communications in the area affected while the other applicant owns radio and television stations and newspapers in the area.[3]

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, are set forth in the appendix to the petition for a writ of certiorari (p. 19).

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[3] The above statement was explicitly found by the court below to be a correct formulation of the question presented on the record (Pet. App. 5). Petitioner's markedly different formulation of the question (Pet. 2) was rejected by that court as an "interesting query" which "does not seem to us to be presented here" (Pet. App. 4).

STATEMENT

The concise and accurate Statement contained in the Government's opposition is incorporated by reference herein. In view, however, of petitioner's repeated assertions with respect to its alleged superiority over Sacramento Telecasters, Inc. (hereinafter called "Telecasters") in all significant areas of comparison, it is believed that it will be helpful to the Court to delineate briefly the facts of record and the commission's findings thereon as to certain areas in which Telecasters was decidedly superior to petitioner. In addition, it is proposed to describe the facts of record which led the commission to conclude that Telecasters was entitled to a substantial preference as to the factor of diversification of the media of mass communication (R. 118).

A. Local Residence of Principals

All of the stock subscribers of Telecasters are, or proposed to become,[4] residents of Sacramento; indeed, over 90 percent of them have lived in that community for very substantial periods of time (Fdgs. 20-21, R. 71-75; Concl. 11, R. 112-114). In contrast, petitioner is a wholly-owned subsidiary of McClatchy Newspapers. Most of the beneficial owners of the common stock of McClatchy Newspapers are not Sacramento residents.[5] Except for Miss Eleanor McClatchy, a one-

---

[4] All facts are stated as of the time that the record before the commission was completed.

[5]

Beneficial Owner	Percentage	Residence
Eleanor McClatchy	33-1/3%	Sacramento
Charlotte Maloney	33-1/3%	San Francisco
Charles K. McClatchy	11-1/9%	Sacramento
James B. McClatchy	11-1/9%	Fresno
William E. McClatchy	11-1/9%	Fresno

(Fdg. 17, R. 66)

third owner, none of the beneficial owners of McClatchy Newspapers has had a continuing association with the Sacramento community (Concl. 11, R. 112-114).

In light of the above facts, the commission concluded that Telecasters was superior with respect to the factor of local residence (Concl. 11, R. 112-114). This conclusion was sustained by the court below (Pet. App. 7).

B. Integration of Ownership With Management

Telecasters' station will be directly operated by its owners. The full-time general manager of the station will be Mr. Schacht, a 15.45 percent stock subscriber who is also vice-president and a director (Fdg. 20, R. 71-72). Mr. Schacht will report to Mr. William Wright, the president. Mr. Wright is an 11.56 percent stock subscriber who proposes to devote two to three hours a day at the station participating in its management (Fdgs. 20, 23, R. 71-72, 76). The secretary, who is a 5.45 percent stock subscriber and director, will devote about seven and one-half hours a week to the station and expects to act as its local lawyer (Fdgs. 20, 23, R. 71-76). The treasurer, a 3.64 percent stock subscriber, will perform the usual duties of that office (Fdg. 20, R. 71-72).

In addition to the post of general manager, two other full-time key staff positions will be filled by stock subscribers. The program director will be Mr. Pollock, a 5.45 percent stock subscriber (Fdgs. 20, 23, R. 71-72, 76), and the chief engineer will be Mr. Onnigian, a 2.73 percent stock subscriber (*ibid.*). Moreover, Mr. Richards, a 5.45 percent stock sub-

scriber who has extensive agricultural experience, will devote 10 percent of his time to the station's programming as to agriculture and civic activities (*ibid.*). All of the stockholders will meet twice a month to discuss the station's plans, policies and operations (Fdg. 23, R. 76, 77).

Petitioner's proposed television station will have no integration of ownership with management. As the commission noted (Concl. 11, R. 112, 113), "No one having an ownership interest in McClatchy will participate in the day-to-day operation of its television station." While several of the beneficial owners are officers, directors and members of the voting trust, none, except Miss Eleanor McClatchy, the president, has "any say" in the running of the broadcast station (*ibid.*)

On the basis of the evidence the commission concluded that "We also find that Telecasters is superior to McClatchy in its integration of ownership with management" (Concl. 11, R. 112). This conclusion was sustained by the court below (Pet. App. 7).

C. Participation of Principals in Community Life of Sacramento

The principals of Telecasters are intimately involved with the every-day life of Sacramento. Their contact with the business and professional life of the community stems from their individual participation in a variety of representative lines of endeavor (Fdg. 20, R. 71-72). In addition, they have been actively associated in highly responsible capacities with numerous organizations devoted to civic betterment. Telecasters' principals have demonstrated their awareness of and responsiveness to community needs by

their participation in a multitude of fund raising drives for the Community Chest, Red Cross, Boy Scouts, and similar civic organizations (Fdgs. 21, 22, R. 72-76).

Again, the comparison with petitioner is striking. C. K. McClatchy, the late father of Miss Eleanor McClatchy and founder of the dynasty, established a policy of discouraging civic participation by the members of his organization (Fdgs. 19(c), (f), R. 69-71). That policy, like Mr. McClatchy's other policies, has been strictly followed to this day (*ibid.*). It has been noted above that most of the beneficial owners of petitioner are not Sacramento residents. Neither of the two who do reside there (Miss Eleanor McClatchy and James B. McClatchy) participates in civic affairs. They have deliberately avoided such intermingling in the affairs of their city (Fdg. 19(c), R. 69-70). The same policy has been adhered to by other executives of petitioner who hold no ownership interest (Fdg. 19 (f), R. 70-71).

On the basis of the evidence, the commission concluded (Concl. 11, R. 112):

> Over 90% of Telecasters' subscribers are long time local residents of Sacramento who have been very active in civic and local affairs. They represent a good cross-section of the business and professional interest in the community. All of its directors have resided in Sacramento for many years. McClatchy, in effect, is owned one-third by Eleanor McClatchy, who is a native of Sacramento, while the other owners have not had a continuing association with the Sacramento community. The business interests of all of its stockholders, officers and directors are in McClatchy newspaper and broadcast operations. They, be-

cause of McClatchy policy, have not been active in local civic organizations. * * *

The conclusion that Telecasters was superior as to civic participation was sustained by the court below (Pet. App. 7).

D. Diversification of Media of Mass Communication

Telecasters is a new corporation formed specifically for the purpose of operating a television station in Sacramento. It has no other interest of any kind. None of its stock subscribers, officers or directors (except Mr. Schacht), has any interest in newspapers, broadcast stations or any other media for dissemination of mass communication (Fdg. 28, R. 80). Mr. Schacht proposed to dispose of his existing interest in Station KMOD at Modesto (*ibid.*).

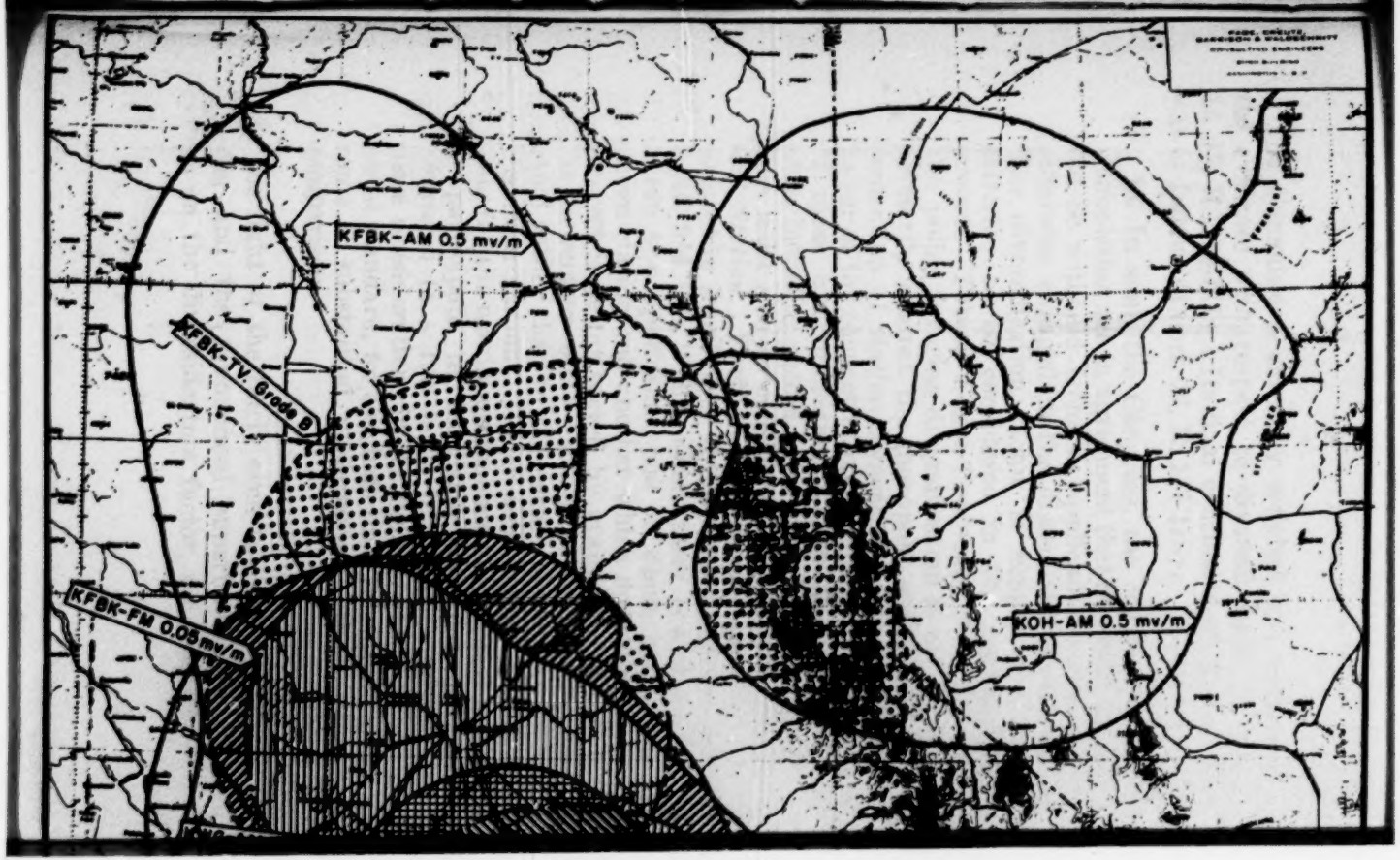
Petitioner is licensee of a number of radio stations with overlapping signals which are received in the Central Valleys of California. McClatchy Newspapers, parent of petitioner, publishes a number of newspapers in the same area. The following table shows the location of the closely coordinated broadcast and newspaper interests of McClatchy affiliated corporations (Fdgs. 24-27, R. 77-80):

City	Medium	Name or Call Letters
Sacramento	Radio	KFBK-AM KFBK-FM
	Newspaper	*Sacramento Bee*
Fresno	Radio	KMJ-AM KMJ-FM
	Television	KMJ-TV
	Newspaper	*Fresno Bee*
Stockton	Radio	KWG
Bakersfield	Radio	KERN KERN-FM
Modesto	Radio	KBEE-FM
	Newspaper	*Modesto Bee*
Reno, Nevada	Radio	KOH[6]

The extent to which the daytime radio and television services of McClatchy overlap is graphically shown in the map on facing page which was an exhibit in the record before the commission (Telecasters' Ex. 169). It is to be noted that if petitioner's television application for Sacramento were granted, the cities listed below and their environs would receive the following separate McClatchy daytime broadcast signals (*ibid.*).

City	Number of McClatchy Signals
Sacramento	4
Stockton	6
Fresno	3
Bakersfield	3

[6] This station does not serve the Valleys, but it does serve a substantial part of the coverage area of the proposed television station. See Map facing page.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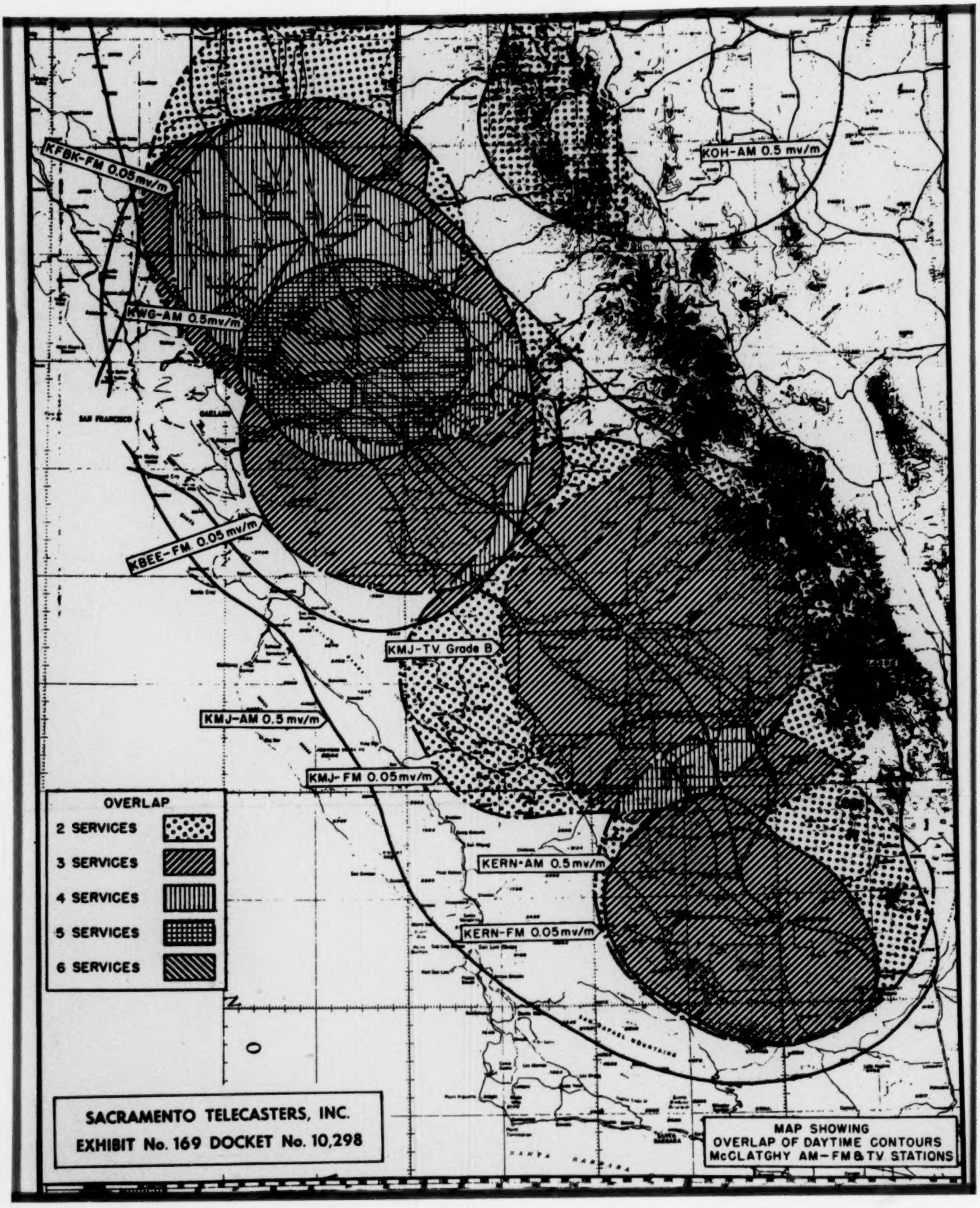
KFBK-FM 0.05 mv/m
KOH-AM 0.5 mv/m


KFBK-FM 0.05 mv/m
KWG-AM 0.5 mv/m
KOH-AM 0.5 mv/m
KBEE-FM 0.05 mv/m
KMJ-TV Grade B
KMJ-AM 0.5 mv/m
KMJ-FM 0.05 mv/m
KERN-AM 0.5 mv/m
KERN-FM 0.05 mv/m
OVERLAP
2 SERVICES
3 SERVICES
4 SERVICES
5 SERVICES
6 SERVICES
SACRAMENTO TELECASTERS, INC.
EXHIBIT No. 169 DOCKET No. 10,298
MAP SHOWING
OVERLAP OF DAYTIME CONTOURS
McCLATCHY AM-FM & TV STATIONS

The Commission carefully weighed and compared the evidence with respect to diversification (Concls. 14, 15, R. 116-117). Its final conclusion on this issue was as follows (Concl. 16, R. 117-118):

> 16. In sum, the Congress, the courts and this Commission are in agreement that a permit should not be withheld from an applicant because it is otherwise engaged in the dissemination of news. The diversification factor is simply one more criterion to be considered in the comparative process. *Tampa Times Company,* FCC 54-1132. Our policy favoring diversification is not directed primarily against the monopoly aspects of concentration of station ownership. The important factor of the concentration of control of the media of mass communication within any particular area, including media other than broadcast facilities must also be considered. *WJR, The Goodwill Station.* Further, we reiterate our view expressed in *Bamberger Broadcasting Service, Inc.,* 3 RR 914, 925, "That where there is a choice between two applicants, one of whom has a television station and another which does not, public interest is better served by granting a license to the newcomer other factors being substantially equal rather than to the person already having a television station. Under this policy, it is possible for the maximum number of qualified people to participate in television and not have it restricted to a few large interests." Weighing these considerations in the light of the public interest standard, we conclude that Telecasters warrants a substantial preference in this area of comparison.

In the light of the fairly even balance as to other criteria, and the pronounced superiority of Telecasters on the diversification factor, the Commission

ultimately concluded that Telecasters was the better of the two applicants (Concls. 13-18, R. 113-118). It granted the application of Telecasters and denied the application of petitioner (Concl. 21, R. 119). The court of appeals unanimously sustained that decision (Pet. App. 7-8, 10-11).

ARGUMENT

The decision of the court below is fully supported by the record and is in accordance with settled legal principles. No question is presented which would warrant review by this Court.

The decision of the Federal Communications Commission which was unanimously affirmed by the court of appeals was a routine decision in a comparative proceeding involving two mutually exclusive applications for the same television channel. Each applicant was found to be superior in certain respects. Thus petitioner was found superior on the basis of prior broadcast record and experience (R. 110-112) while Telecasters was found superior as to the factors of integration of management and ownership, local residence of owners, civic participation, and diversification of the media of mass communication (*supra,* pp. 3-10). After weighing all relevant factors, the commission concluded that Telecaster's substantial superiority in diversification outweighed any preferences in favor of petitioner (R. 116-118).

The court below carefully reviewed the record and determined that the commission's findings and conclusions were fully supported by the evidence (Pet. App. 7-8), and that its ultimate decision was not arbitrary or capricious (Pet. App. 8). Thus the court

of appeals meticulously discharged its review function.[7] *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474.

Petitioner is presumably aware that the questions whether the commission has reached a proper evaluation of factors in a particular case, and whether the court of appeals has reached a correct determination as to the substantiality of the evidence to support the commission's decision, do not constitute certiorari questions. Accordingly, petitioner seeks to have the case considered as though the court of appeals had enunciated a rule of law to the effect that the commission may give overriding weight to the diversification factor, and exclude all other factors from consideration.[8] No such doctrine is to be found in the opinion below—either expressly or by implication. Indeed,

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[7] Had the court gone on (as petitioner seemingly would have had it do), to make its own decision as to whether Telecasters or petitioner was the better qualified applicant, the court would have invaded the proper administrative province of the commission. *National Broadcasting Co.* v. *United States,* 319 U.S. 190; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134; *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515; *Federal Communications Commission* v. *Allentown Broadcasting Corp.,* 349 U.S. 358, 363-364.

[8] It would of course be improper for the commission to disregard *any* relevant factor affecting the comparison of applicants. But this does not mean that superiority of one applicant as to one factor may not be so significant as to outweigh other factors as to which there is less difference. Thus, in the present case, Telecasters' *overwhelming* superiority as to diversification (*supra,* pp. 7-10) might reasonably have been given decisive weight even if petitioner had been superior in all other respects, which it clearly was not. As has been pointed out, Telecasters was superior in the important factors of local residence, integration, and civic participation (*supra,* pp. 3-7).

the court of appeals specifically held that the question sought to be raised by petitioner was an "interesting query" which "does not seem to us to be presented here" (Pet. App. 4).

The only question actually presented by this case is whether it is unlawful for the commission to weigh the diversification factor along with other factors in choosing the applicant who will better serve the public interest. Even if this were a case of first impression, there could be no serious doubt of the commission's power to follow a policy of encouraging a multiplicity of diverse viewpoints in licensing scarce broadcast frequencies by giving preference to otherwise well qualified applicants who are not already owners of multiple broadcast and publishing interests. See *Associated Press* v. *United States,* 326 U.S. 1, 20; *United States* v. *Storer Broadcasting Company,* 351 U.S. 192, 203. Moreover, this is not a case of first impression.

For a number of years the commission has considered diversification along with other relevant public interest factors, and its action in doing so has been uniformly sustained in a series of cases of which *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 189 F. 2d 677 (C.A.D.C.), *cert. den.* 342 U.S. 830 is typical. The opposition filed by the Government contains a comprehensive review of the authorities. The Government's discussion of those authorities is incorporated herein by reference.

CONCLUSION

For the foregoing reasons, and those stated in the opposition filed on behalf of the Federal Communications Commission, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 1, 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 733

MCCLATCHY BROADCASTING COMPANY, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

In their oppositions, both the Commission and Telecasters contend that the question set forth by petitioner is not, in fact, presented in this case. In so doing, they attempt to mislead this Court, as they successfully misled the court below, into believing that petitioner has not correctly stated the question presented for review. They argue, as they did below, that the Commission did not grant the television license to Telecasters "on the sole ground" that that applicant was free from asso-

ciations with mass communication media, while petitioner had such associations. It is said rather that there were other grounds supporting a grant to Telecasters over McClatchy. The other alleged grounds relied upon are the superiority of Telecasters over petitioner in the areas of local ownership, integration of ownership and management, and participation in community civic affairs. Respondents urge that since Telecasters was awarded preferences in those areas, as well as on the issue of diversification, it is erroneous for petitioner to say that Telecasters won before the Commission "solely" because of its freedom from ties with other media of mass communications. This is but a further attempt to perpetuate an error.

The court below was erroneously led into believing that petitioner herein had not properly stated the question for decision. Thus it did not pass upon the real question for review. The opinion below states that:

> "But, contrary to the assumption in appellant's version of the first question, the Commission did not find McClatchy superior in every area of comparison save that of diversification of facilities for publishing information, and did not deny it the construction permit solely because of its ownership of newspapers and broadcasting stations . . . " (App. 4).
>
> * * *
>
> "With ample support in the record, the Commission found Telecasters superior to McClatchy as to local ownership, participation in the civic life of the community, and in the integration of ownership with management." (App. 7).

The correctness of the question presented must be determined by what the Commission said in its decision

and not by what either respondents or the lower court say about that decision. In its decision, the Commission compared Telecasters' local ownership, civic participation and integration (which the Commission said are only presumptions that an applicant will effectuate its proposals) with McClatchy's record of performance. On the comparison, McClatchy was awarded the preference. The Commission did not consider local ownership and the other similar presumptive factors *in vacuo*, but compared them to McClatchy's outstanding record "affirmatively demonstrating performance". The court below was led into the error of believing that Telecasters received preferences for local ownership and the other presumptive factors, which simply is not the case.[1] The Commission's decision makes this point clear:

> "If we were to compare the applicants solely on the basis of these criteria—integration of ownership and management, diversity of business background, civic participation and local residence—we would find that Telecasters merits a distinct preference. *However, these factors, as so often stated, are only guideposts or presumptions for determining which applicant is more likely to carry out its proposal and remain alert to the area's needs.* They give assurance that the changing needs of the community will be reflected in the station's programming. *Tampa Times Company,* FCC 54-1132. But, the foregoing factors are less critical or determinative when a record establishing an applicant's past performance is available. *Hearst Radio, Inc.,* 6 RR 994; *WJR, The Goodwill Station, Inc.,* 9 RR

[1] It is significant that neither the Commission nor Telecasters challenged McClatchy's statement that Telecasters' local ownership, civic participation and integration were pitted against McClatchy's record of performance and the award of the preference went to McClatchy. See petition, n. 3.

227. McClatchy has demonstrated that audience preferences and needs, as ascertained through its research department, are incorporated into its program schedule. It is evident from McClatchy's record that it has been responsive to the local needs. *As for McClatchy, we need not look into such matters as local residence, civic participation, integration of ownership and management and diversity of background because its record speaks strongly in its behalf.* With regard to Telecasters, the local residence and the other factors are important from the long range point of view because these give assurance of continued insight into the area's needs and continued operation in the public interest. Thus, in evaluating McClatchy's past record for which it deserves preference and the other factors in which Telecasters has demonstrated superiority, we find that both give assurance that their television operation will be effectuated as represented and will remain aware of and sensitive to the needs of the communities. *However, in weighing McClatchy's outstanding record affirmatively demonstrating performance, against the presumptions gathered from Telecasters' integration of ownership with management, and other similar factors relating to the likelihood of effectuating its proposal, we believe McClatchy warrants a slight preference."* (R. 113-114) (Emphasis supplied.)

Contrary to the opinion below and the oppositions herein, it is wholly inaccurate to suggest that the Commission in any way justified its ultimate grant to Telecasters on the basis of Telecasters' supposed superiority in the areas of local ownership, integration of ownership and management or civic participation. Those factors, labeled by the Commission as merely presumptive, were weighed against petitioner's "outstanding record" of past broadcast performance, and petitioner

was awarded the "final" preference with respect to the reliability of effectuating its proposal and remaining alert to area needs (R. 114). Although several factors were discussed in this comparative area, only one preference was awarded and it was awarded to McClatchy.

Up to this point in the Commission's decision, there was only one preference awarded based upon the superiority McClatchy had demonstrated with respect to a number of factors. The Commission then considered the factor which it considered "to be determinative in this proceeding—diversification of the control of the media of mass communications" (R. 114). In sum, two final preferences were awarded[2]—one for reliability of effectuation of proposals and one for diversification. Since the first of these was awarded McClatchy, there can be no doubt but that Telecasters was awarded the grant solely because McClatchy has newspapers and broadcast interests.

In the only comparative area where a preference was awarded, save diversification, McClatchy was the recipient of that preference. Inasmuch as Telecasters received the award, McClatchy must have been denied because of its other mass media associations. Diversification was determinative. Indeed, according to the Commission's own decision, it was the only factor relied upon to support the grant.[3] This is obvious from the

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[2] Neither applicant was awarded a preference, rightly or wrongly, for its proposals (R. 106-107).

[3] In portions of its brief in opposition, the Commission effectively concedes that the sole justification for the award to Telecasters was the diversification issue. That brief states (pp. 4-5):

> "The Commission concluded that McClatchy's experience and record of performance gave slightly more assurance that its program proposals would be effectuated and that it would re-

Commission's ultimate conclusion, which reads as follows:

> "We conclude that under these circumstances the superiority McClatchy has demonstrated with respect to certain factors does not outweigh the comparative advantages adhering to Telecasters because of its freedom from ties with other radio, newspaper and television interests . . ." (R. 118)

In this conclusion only one area of advantage is suggested for Telecasters, *viz.*, its freedom from mass-media ties. Clearly, therefore, the issue presented in this case is whether the Federal Communications Commission, after a comparative hearing between two competing applicants for a television station, has the power to award the grant to one applicant on the sole ground that the other applicant has newspaper and broadcast interests.

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main responsive to the needs of the community than did Telecasters' superiority as to local ownership, integration of ownership and management, and civic participation (R. 113-114). *It found, however, that this slight advantage was greatly outweighed by Telecasters' substantial superiority in diversification of control of the media of mass communications (R. 118). Since in all other respects no choice could be made between the applicants, the Commission concluded that the public interest would be better served by a grant to Telecasters (R. 118).*" (Emphasis supplied.)

And it is further stated in that brief (pp. 10-11):

> "In the instant case, diversification assumed greater importance because of the relatively even balance of the two applicants with respect to the other pertinent criteria, and because of Telecasters' wide margin of superiority in the area of diversification."

See Petition 8 and 11-12, notes 7 and 13, respectively, in regard to the Commission's characterization of McClatchy's preferences as "slight".

Elsewhere in its opinion, the court below recognized the superiority of McClatchy in all respects but diversification, nevertheless it refused to properly review the question presented to it. By so doing, the lower court has put its stamp of approval upon a doctrine that was discriminatory in its inception and is even more so today. The decision of the court below permits diversification to be applied so as to defeat a superior applicant, without relating it to monopolization or even to over-concentration of broadcast control. As it is a wholly unreasoned and unexplained doctrine, it can be used like grapeshot by the agency. The agency's decision is wholly immune from attack because the discretion to use or not to use the doctrine is wholly unbridled.[4]

In *Scripps-Howard,*[5] the court below stated that the Commission could attach "significance" to the fact that one applicant is disassociated from existing media of mass communication in the area affected. This same court has now approved attaching "decisive significance" to diversification[6] and the further extension

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[4] See *Sunbeam Television Corporation* v. *Federal Communications Commission,* (U.S. App. D.C. Cir. No. 13180, decided March 14, 1957).

[5] *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 189 F. 2d 677 (D.C. Cir., 1951), cert. denied, 342 U.S. 830 (1951).

[6] The Government's opposition erroneously contends (Opp. pp. 6-7) that no novel question is presented by the petition for certiorari "but only the correctness of the application of settled principles to the facts of this case." In support of this contention it cites *Scripps-Howard* and several appellate decisions (See Opp. n. 4). Suffice it to say that none of the cases cited stand for the proposition that the Commission can deny an otherwise superior applicant simply because of its mass-media associations.

was granted without any examination of the doctrine itself. Because the Commission's decision represented such an unwarranted extension of an already discriminatory doctrine, the American Newspaper Publishers Association felt compelled to appear in the court below as *amicus curiae,* urging reversal, and in this Court in support of the petition for certiorari. If the question presented for review is as stated by the oppositions, the American Newspaper Publishers Association would certainly not be in the case.

A pure question of law was framed for the court below. That court was mistakenly led into believing that the question set forth by petitioner herein was not, in fact, presented. The court unduly restricted its review due to this mistaken notion and thereby put its stamp of approval upon an unreasoned extension of an already discriminatory policy—a policy not based upon evidence of record and not shown to be related to the public interest.

In sum, the opinion below represents a dangerous extension of previous appellate court decisions touching the question presented, which extension is not in accord with previous pronouncements of this Court. The question presented for review is of tremendous importance to the future administration of the Communications Act. The opinion of the court below dangerously extends a policy which can be used arbitrarily to deny a superior applicant and results in depriving the public of the best possible broadcast service.

CONCLUSION

For the foregoing reasons, and those stated in the petition for certiorari, the petition should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 733

McCLATCHY BROADCASTING COMPANY, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

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No. 733

MCCLATCHY BROADCASTING COMPANY, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

PETITION FOR REHEARING

As previously indicated, this case is of tremendous significance to the entire broadcasting industry. In fact, the question presented by petitioner is undoubtedly one of the most important issues in the field of communications law presented to this Court in the past decade. If left standing, the decision below will adversely affect every licensee of every radio and television broadcasting station in the country, every newspaper publisher, and every individual in any way associated with any media of mass communication. Under the agency policy approved in this case, any existing broadcast licensee, when applying to the Fed-

eral Communications Commission for additional facilities, and any individual or corporation connected with the business of newspaper publishing, when applying to the Commission for even an initial broadcast license, will be subjected to the possibility of automatic defeat without regard to demonstrable superiorities for the public interest.

Perhaps of even greater importance, the decision below has far reaching ramifications which are clearly detrimental to the entire radio listening and television viewing public of the country. It approves a grant of a broadcast license by the Federal Communications Commission to the inferior of two competing applicants, to the detriment of the public.

Over a period of years, the Commission has gradually developed and expanded its so-called policy of diversification of the media of mass communication to the end that now that policy can be employed by itself to defeat an otherwise superior applicant in a comparative proceeding for a broadcast facility. The instant case makes clear for the first time the danger inherent in the application of this policy. It has become the instrument of caprice and abuse of discretion, and could be so used, as sanctioned by the court below, in every radio or television hearing involving an applicant associated with other mass-media. This Court now has an opportunity to pass on the validity of this sweeping and discriminatory policy, which, standing alone, is wholly unrelated to the public interest, convenience or necessity. It is because of the extreme importance of this issue, both to the industry and to the public in general, that petitioner feels a petition for rehearing is indicated.

The only real basis for the briefs in opposition filed by the Commission and Telecasters was that petitioner had misconceived the question, in that the issue raised is not, in fact, presented by the case. This is erroneous, and the denial of certiorari by this Court will result in the perpetuation of a fundamental error made by the court below when it decided the case upon a question not presented by the facts and the decision of the Commission. If petitioner's statement of the question had been accepted, the court below would have been required either to rule in favor of petitioner, or declare outright that a television applicant could be discriminated against solely because it was the owner of newspapers.*

In view of the position assumed by the Commission and Telecasters in opposition to the petition for certiorari, it was incumbent upon petitioner to file a reply brief. Such a brief was filed on Wednesday, March 20, 1957, to the end that the arguments in opposition would be dispelled. On the following Monday, March 25, 1957, the petition for certiorari was denied. Accordingly, it appears that this case was considered by the Court at its conference of Friday, March 22, 1957—less than two full days following the filing of the reply brief. Were it not for the fact that the case is patently of national importance, and were it not for the additional fact that, in view of the briefs in opposition, the reply brief assumed increased significance, petitioner would have rested with the Court's order of

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* This, of course, would have been directly contrary to the Court of Appeals' decision in *Stahlman* v. *Federal Communications Commission*, 75 U.S. App. D.C. 176, 126 F. 2d 124 (1942). If the decision here is left standing, the *Stahlman* case will have been impliedly overruled and legal sanction will have been given to unconstitutional discrimination.

March 25, 1957. However, under the circumstances, it is respectfully urged that the petition for certiorari be reconsidered in the light of the reply brief.

Still another circumstance looms large. The Court's order of March 25, 1957, noted that the Chief Justice did not participate in the consideration and decision of the petition. Petitioner, of course, does not argue with the Chief Justice's disqualification of himself. However, that fact resulted in a Court composed of only seven Justices for consideration of the certiorari petition, since one vacancy on the Court then existed. In the interim—in fact, on the same day the petition for certiorari was denied—Mr. Justice Wittaker filled the vacancy created by Mr. Justice Reed. Therefore, again in view of the tremendous importance of the question presented, it is urged that rehearing be granted so that the present full Court may have an opportunity to consider this case.

It is inconceivable that this Court will refuse to review a case in which the Federal Communcations Commission, with the sanction of the Court of Appeals, has done the very thing it told Congress it had no power to do, namely, discriminate against an applicant solely on the ground that such applicant was engaged in a particular line of business, thus abusing its power and acting against the public interest.

For the foregoing reasons, it is respectfully submitted that a petition for writ of certiorari to the

United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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No. 733

Supreme Court of the United States

OCTOBER TERM, 1956

MCCLATCHY BROADCASTING COMPANY, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

BRIEF OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The original opinion of the Court of Appeals (R. 341, P. App. 1) is reported at 239 F. 2d 15 and the opinion of the Court of Appeals on rehearing (R. 351, P. App. 9) is reported at 239 F. 2d 19.[1]

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[1] The Initial Decision of the Examiner (R. 15) is unreported. The Decision of the Federal Communications Commission (R. 55) is unofficially reported at 9 Pike & Fischer R. R. 1190.

JURISDICTION

The original judgment of the Court of Appeals was entered on January 27, 1956. A timely petition for rehearing was granted on May 10, 1956, and on the same date the original judgment was vacated. (R. 350) Following rehearing, the judgment of the Court of Appeals was entered on November 1, 1956. (R. 361, P. App. 18) The jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. § 1254(1).

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Its membership embraces publishers of more than 800 daily and/or Sunday newspapers, all of whom are vitally interested in an issue presented in this case by the decision of the Court below.

This Amicus Curiae, through the submission of its brief herein, supports the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to the end that that Court's decision, affirming an order of the Federal Communications Commission based upon a policy of the Commission singling out newspapers or persons associated with newspapers as a special class for discriminatory treatment in contested proceedings before that body, be reviewed.

In submitting its brief, this Amicus Curiae does not seek to persuade this Court to review the decision below for the purpose of obtaining a decision placing persons engaged in the newspaper publishing business or associated therewith in a preferred position. What it

seeks by supporting the petition is a review of the decision below, because that decision is in conflict with the principles heretofore enunciated by this Court that (a) the entire field of radio broadcasting is open on equal terms to all persons except those specifically disqualified by the Act and (b) the public interest and convenience require the granting of a license or a construction permit, as the case may be, to that applicant who demonstrates its ability to render the best practicable service to the community reached by its broadcasts.

This Amicus filed a brief as Amicus Curiae in the Court below on the original hearing and a memorandum in support of Petitioner's petition for rehearing.

QUESTION PRESENTED

The question presented is stated by Petitioner thus:

> Whether the Federal Communications Commission, after a comparative hearing between two competing applicants for a television station, has the power to award the grant to one applicant on the sole ground that the other applicant has newspaper and broadcasting interests in the area involved.

In addition, this Amicus submits that the diversification policy of the Commission, as construed and upheld by the Court below, is discriminatory, per se, and, therefore, unlawful because it exceeds the statutory authority conferred and in a manner repugnant to the Fifth Amendment.

CONSTITUTIONAL PROVISION INVOLVED
FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of the Communications Act of 1934, as amended, cited by Petitioner, (P. App. D. 19) this Amicus also cites Sec. 402(h) of said Act:

> "(h) In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined."

LEGISLATIVE HISTORY

The narration of the Legislative History of the Communications Act presented by Petitioner in Appendix E of P. App., pages 20-53, inclusive, is incorporated herein by reference.

ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

The orders of the Federal Communications Commission set forth by Petitioner in Appendix F of P. App., pages 53-58, inclusive, are incorporated herein by reference.

STATEMENT OF THE CASE

In the interest of brevity, the Amicus Curiae incorporates by reference herein the statement of the case as set forth in the brief of the Petitioner herein. For the information of the Court, however, a statement of the historical background of the controversy is submitted. This statement will deal (a) with the development of the conflict over newspaper ownership of radio and television stations, (b) with the genesis of the Federal Communications Commission policy of "diversification" of ownership and its development into a policy of outright preference for non-newspaper applicants over newspaper applicants, and (c) with petitioner's record of outstanding service of approximately a century in the newspaper field and more than one-third of a century in the broadcasting field.

HISTORICAL BACKGROUND

(a) Broadcasting emerged from the laboratory stage early in the nineteen twenties, television approximately two decades later. At the time of broadcasting's emergence, Congress had not given consideration to the myriad problems that shortly developed in respect of its regulation under the Commerce Clause. For several years, the Department of Commerce sought to establish an orderly control of the business through the issuance of licenses to broadcasters under the Act of 1912 regulating short wave communications services. In 1926, this effort by the Department was terminated by the decision of the District Court of the United States for the Northern District of Illinois in the case of *United States* v. *Zenith Radio Corporation,* 12 F. 2d, 614.

In the period prior to 1926 some newspapers, either directly or through persons associated with them or affiliates, pioneered in rendering broadcast service. On February 2, 1922, Petitioner herein was licensed to operate the first newspaper-owned broadcast station on the Pacific Coast (R. 77).

In 1927, Congress enacted a law regulating broadcasting and in 1934 Congress supplanted this Act with the Federal Communications Act of 1934, which Act with amendments made thereto from time to time is now in effect.

With the rapid development of broadcasting in the late twenties and early thirties, newspapers applied for and obtained numerous licenses. As the field began to fill up, there were numerous contested proceedings before the Federal Communications Commission, and, in the late thirties, the question of newspaper ownership being in the public interest was first presented in a contested case. *Tri State Broadcasting Company, Inc.* v. *Federal Communications Commission,* 96 F. 2d, 564 (1938).

That case held, as the Court below said in the *Stahlman* case, *infra,* there was "nothing in the Act which either prevents or *prejudices* the right of a newspaper, as such, to apply for and receive a license to operate a radio broadcast station." (Emphasis supplied) 126 F. 2d at 127.

In 1940, in another case involving a newspaper, *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470-478, this Court announced the principles set forth in the statement of "Interest of the Amicus Curiae" *supra,* namely, that the entire field of radio broadcasting is open on equal

terms to all persons except those specifically disqualified by the Act and that the public interest and convenience *require* the granting of a license or construction permit, as the case may be, to that applicant who demonstrates its ability to render the best practicable service to the community reached by its broadcasts.

At no time since that decision has Congress amended the Act to disqualify newspapers or persons associated with newspapers from receiving a license or a construction permit. Nor has it empowered the Commisson to deviate from the standard requiring it to grant a license or a construction permit to the applicant in a contested proceeding who demonstrates its ability to render the best practicable service to the community reached by its broadcasts.

(b) The controversy over newspaper ownership of stations was not terminated by the *Sanders* case. Rather, it increased and in 1941 the Federal Communications Commission promulgated Orders 79 and 79A for the avowed purpose of determining what statement of policy or rules, if any, should be issued concerning applications with which are associated persons associated with one or more newspapers, as well as what statements of policy or rules, if any, should be issued concerning future acquisition of stations by newspapers. (Order No. 79A, July 1, 1941, P. App. F. pages 55-56).

Hearings were held by the Commission pursuant to Orders 79 and 79A and in due course the Commission's authority to issue any rules or statement of policy with specific discriminatory reference to newspapers or persons associated with newspapers was challenged

in the Court below in *Stahlman* v. *Federal Communications Commission,* 126 F. 2d 124 (1942). That Court, relying upon the *Sanders* case, *supra,* held that the Commission was without authority even "by implication" to put a ban on newspapers as such.

Notwithstanding the decision in the *Stahlman* case, the Commission, on January 13, 1944, issued a notice in which it announced a policy of "diversification". (P. App. F. pages 57-58).

In its notice the Commission said, inter alia:

> "The Commission has concluded, in the light of the record in this proceeding and of the grave legal and policy questions involved, not to adopt any general rule with respect to newspaper ownership of radio stations.
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> * * * * *
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> "Aside from the specific question of common ownership of newspapers and radio stations, *the Commission recognizes the serious problem involved* in the broader field of the control of the media of mass communications *and the importance of avoiding monopoly of the avenues of communicating fact and opinion to the public.* All the Commissioners agree to the general principle that diversification of control of such media is desirable. The Commission does not desire to discourage legally qualified persons from applying for licenses, but does desire to encourage the maximum number of qualified persons to enter the field of mass communications, and to permit them to use all modern inventions and improvements in the art to insure good public service. . . ." (Emphasis supplied.)

At various times since 1944, Congress has inquired into the application of the diversification policy by

the Commission and on each of these occasions the Commission has assured Congress that it was not using that policy for the purpose of discriminating against newspaper applicants. For a more complete consideration of the Congressional proposals, hearings thereon, and statements made to the committees of Congress by representatives of the Commission, reference is made to the legislative history set out by Petitioner in the Appendix E to its brief, pages 20-53.

The attention of this Court is respectfully directed to that legislative history.

In the period between 1941, when Orders 79 and 79A were issued, and 1948, tremendous strides were made in the art of television.

As a result of these advances in the art, many holders of licenses for standard (AM) and frequency modulation (FM) stations began to pioneer in the television field. A majority of the grants made to applicants for television construction permits were to experienced broadcasters, many of whom had newspaper affiliations. These grants made prior to 1948 were largely after consideration by the Commission of uncontested applications.

By 1948, the Commission found itself in such a maze of administrative problems incident to providing proper television service for the public that it decided to take time out for an overall study of its problems. It suspended consideration of all pending applications for construction permits for a period of almost four years. Included among the applications put on the shelf was that of Petitioner herein which was originally filed May 7, 1948. This period from 1948 to 1952 has now become known as the freeze period.

In the great majority of the contested cases decided since 1952, in which there were newspapers or persons associated with newspapers in an applicant group, the Commission has invoked its diversification policy in order to render a decision against the applicant owned by or associated with a newspaper.[2]

With the greatly expanded interest in television since 1948, the Commission has in turn expanded its views on diversification to the extent it now says that in contested proceedings it prefers "non-newspaper applicants over newspaper applicants and newcomers to the field over existing licensees." (R. 115)

(c) In 1849, James McClatchy, an Irish immigrant, arrived in the then village of Sacramento, California, and engaged in newspaper work. In 1857, or but seven years after California was admitted to the Union, he founded the Sacramento Bee, which from that date down to the present has been regarded as one of the foremost newspapers of this country,—foremost in that it has always maintained a vigorous independence in its editorial columns, combined with factual objectivity in its news columns, and devoted to the welfare of the people of Sacramento, the Sacramento Valley, the State of California and the nation.

From its founding in 1857 to the present, the Sacramento Bee has always been owned by and its directing head has always been a McClatchy, resident of Sacramento.

Over the span of years, the McClatchy interests have acquired two other newspapers in the Sacramento

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[2] See "Diversification: Its Case History" in the magizine, "Broadcasting-Telecasting", November 1, 1954.

Valley, the Fresno Bee and the Modesto Bee. The same policies of editorial independence and news objectivity that prevailed in the operation of the Sacramento Bee have prevailed in the conduct of these newspapers.

Since the very early days of the art of broadcasting, the McClatchy interests have been engaged in that field. Their first station was established on February 2, 1922, at Sacramento, or more than five years prior to the enactment of the Federal Radio Act of 1927, by the terms of which the Federal government was vested with authority over those engaged in the field of broadcasting.

In their conduct of their radio operations, the McClatchys have been guided by the same high ideals of public service that had marked the conduct of their newspaper business prior to 1922 and have marked it since.

The decision of the Commission, as affirmed by the Court below, specifically found that the operations of Petitioner over the years have,

> ". . . shown a high regard for the needs of the area they serve."

and that Petitioner's proposed television station

> "would be operated in the same excellent manner —aware of its responsibilities and abiding by its public trust." (R. 110)

As against this, the Commission, in its decision affirmed below, found that "Telecasters (successful below) has no record to assay." (R. 110).

Yet, notwithstanding this finding, the Commission denied the application of Petitioner and granted the application of the applicant who had no record to assay and the Court below affirmed.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in affirming the Commission's decision which was based upon the latter's admitted policy of preferring "non-newspaper applicants and newcomers to the field over existing licensees" is in conflict with the holding of this Court that the public interest and convenience require the granting of a license or a construction permit, as the case may be, to that applicant who demonstrates its ability to render the best practicable service to the community reached by its broadcasts. Because of that conflict it should be reviewed by this Court.

In *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470 (1940), this Court construed the standard of public interest and convenience as requiring the granting of an application to the applicant who demonstrates its ability to render the best practicable service to the community reached by its broadcasts. Since that decision Congress has not amended the provisions of the Act so as to permit the Commission to adopt a policy by which persons engaged in the newspaper business may by reason of that fact be differentiated as a class for the purpose either of preference or of prejudice in the assignment of radio facilities. Yet that is precisely what the Commission admits having done and the Court below, by its decision affirming the order of the Commission, has approved this administrative ex-

pansion of the policy laid down by Congress and in a manner repugnant to the Act.

2. The decision of the Court below violates Petitioner's rights as guaranteed by the Fifth Amendment to the Constitution of the United States. Because of that violation it should be reviewed by this Court.

Since the Act confers no power upon the Commission to adopt the policy of preference which it admittedly applied in this case, the decision of the Court below affirming the Commission's decision adverse to Petitioner constitutes an injurious discrimination in violation of the Fifth Amendment to the Constitution of the United States, *Currin* v. *Wallace,* 306 U.S. 1 (1939); *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).

There is nothing in the Act which prejudices the right of a newspaper or persons associated with a newspaper, as such, to apply for and receive a license to operate a television station.

It need only be added under this Point 2 that the classification of applicants who are engaged in the newspaper publishing field for the purpose of differentiation from persons engaged in other fields results in injurious discrimination whether the result were to operate in favor of or against any such persons.

3. The decision of the Court below should be reviewed in order that Sec. 402 (h) of the Act may be given its proper application in this long drawn out controversy.

Upon the basis of the proceedings already had in this controversy and on the records now before this Court, Sec. 402 (h) should be invoked through the granting of the writ prayed for.

In addition to the petition herein, this Court has a companion case before it flowing out of the identical controversy,—*Sacramento Telecasters, Inc., Petitioner* v. *McClatchy Broadcasting Company,* No. 694, October Term, 1956.

These two cases demonstrate the extent to which the Commission went in order to implement its policy of preferring non-newspaper applicants over newspaper applicants and newcomers to the field over existing licensees in its consideration of mutually exclusive applications for construction permits for television stations.

Both were disposed of by the Court below in one opinion *McClatchy Broadcasting Company* v. *Federal Communications Commission,* 239 F. 2d 19 (1956) rendered upon the original appeal of Petitioner herein from the decision of the Commission in No. 694 and upon rehearing granted Petitioner in No. 733 herein.

As pointed out by the Court below, during the hearing before the Commission's examiner, Telecasters was permitted, over Petitioner's objection, to amend its application so as to provide coverage practically equal to that of Petitioner, thereby removing the coverage issue from the case. Then as the Court said,

> "After the hearing, the examiner's initial decision found McClatchy would better serve the public interest, but the Commission disagreed. It recognized McClatchy's outstanding record of public service in the newspaper and radio fields, but considered diversification of control of facilities for the dissemination of fact and opinion to be determinative. On the basis of that holding the Commission issued October 4, 1954, a television construction permit to Telecasters, a newcomer in the communications field without radio or newspaper connections." 239 F. 2d 21.

On November 26, 1954, Telecasters filed an application for modification of the construction permit issued less than 60 days before. It sought not only to change the transmitter site, but to decrease the height of the antenna. Without hearing, the Commission granted the application for modification and when Petitioner petitioned the Commission to stay the effectiveness of the modification and to designate for hearing Telecasters' application therefor, the Commission held that Petitioner had no standing under the Act to be heard. (P. App. B, pages 11-12).

These actions of the Commission were arbitrary and capricious, as well as injuriously discriminatory.

Petitioner appealed to the Court below and that Court consolidated its appeal for argument with the reargument of the case originally decided January 27, 1956. On October 18, 1956, the Court issued its opinion, wherein it affirmed the order in the original case, No. 733 now in this Court, and reversed and remanded the second case for further proceedings before the Commission (No. 694 now in this Court).

The Court below erred in not disposing of the controversy in its entirety and in failing to apply Sec. 402(h) to that end. In the light of its failure so to do, the petition to review should be granted.

CONCLUSION

WHEREFORE, It is respectfully submitted that for the reasons given Petitioner's petition for a writ of certiorari should be granted.

Respectfully,

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

By:

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